No. 92-8579-CFX
Status: GRANTED

Title: Charles K. Elder, Petitioner
v.
R. D. Holloway, et al.

Docketed:
April 19, 1993

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Lynn,John C., Tankersley,Michael

Counsel for respondent: Davis,James J.

Entry	Date	Note	Proceedings and Orders
1	Apr 19 1993	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	May 28 1993		Brief of respondents R. D. Holloway, et al. in opposition filed.
4	Jun 10 1993		DISTRIBUTED. June 25, 1993
6	Jun 28 1993		Petition GRANTED.
			**********
9	Jul 19 1993	G	Motion of petitioner for appointment of counsel filed.
8	Jul 26 1993		Order extending time to file brief of petitioner on the merits until August 27, 1993.
10	Jul 26 1993		Opposition of counsel for respondents to motion of petitioner filed.
11	Aug 3 1993		Record filed.
		*	Original record proceedings United States District Court for the District of Idaho.
12	Aug 5 1993		Record filed.
		*	Partial proceedings United States Court of Appeals for the Ninth Circuit.
13	Aug 6 1993		Joint appendix filed.
14	Aug 13 1993	G	Motion of American Bar Association for leave to file a brief as amicus curiae filed.
15	Aug 27 1993		Brief amicus curiae of American Civil Liberties Union filed.
16	Sep 1 1993		Brief of petitioner Charles K. Elder filed.
17	Sep 24 1993		Motion of American Bar Association for leave to file a brief as amicus curiae GRANTED.
20	Sep 29 1993		Brief of respondents R. D. Holloway, et al. filed.
21	Sep 29 1993		Brief amici curiae of Hawaii, et al. filed.
19	Oct 4 1993		Motion for appointment of counsel GRANTED and it is ordered that John C. Lynn, Esquire, of Boise, Idaho, is appointed to serve as counsel for the petitioner in this case.
22	Nov 4 1993		Reply brief of petitioner Charles K. Elder filed.
23	Nov 16 1993		CIRCULATED.
24	Nov 22 1993		SET FOR ARGUMENT MONDAY, JANUARY 10,1994. (3RD CASE).
25	Jan 7 1994		Letter from counsel for the petitioner received and distributed.
26	Jan 10 1994		ARGUED.

ORIGINAL

No. 92-8579

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

CHARLES K. ELDER,

Petitioner,

v.

R. D. HOLLOWAY, OTHER UNKNOWN EMPLOYEES AND/OR AGENTS, individually and in their official capacity as police officers for the Ada County Sheriff's Office, et al,

Respondents.

Petition for a Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

John C. Lynn
LYNN, SCOTT, HACKNEY & SULLIVAN
1015 W. Hays Street
Boise, Idaho 83702
Telephone: (208) 342-7600

Counsel of Record for Petitioner

QUESTIONS PRESENTED FOR REVIEW

The Panel's opinion below, from which the Ninth Circuit refused to consider en banc, establishes the "Elder rule" (see Reinhardt dissent, Order and Dissents, filed January 27, 1993 - Appendix 2). The Elder rule sets forth the proposition that in considering a civil rights plaintiff's challenge to a state official's qualified immunity defense, appellate courts may not consider cases or precedents which the plaintiff failed to cite to the district court. Therefore, the question presented here is whether a party on appeal may rely only on those authorities cited to the district court.

PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS

The parties to the proceedings in the United States Court of Appeals for the Ninth Circuit, the Order of which is here for review, include:

1. Petitioner Charles K. Elder, Appellant in the Court of Appeals; and
2. Respondents R.D. Holloway, other unknown employees and/or agents, individually and in their official capacity as police officers for the Ada County Sheriff's Office, et al, Appellees in the Court of Appeals.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY AND CONSTITUTIONAL PROVISIONS	2
STATEMENT OF THE CASE	3
ARGUMENT FOR ALLOWANCE OF WRIT	5
CONCLUSION	8

APPENDIX

A. Opinion of the Panel, filed December 19, 1991

B. Order and Dissents denying Appellant's Petition for Rehearing and rejecting suggestion for rehearing en banc, filed January 27, 1993

C. U. S. District Court Memorandum Opinion and Order, filed November 21, 1990

TABLE OF AUTHORITIES

Anderson v. Creighton, 483 U.S. 635 (1987)	6
Backlund v. Barnhart, 778 F.2d 1386 (9th Cir. 1985)	7
Davis v. Scherer, 468 U.S. 183 (1984)	6
Duncan v. Storie, 869 F.2d 1100 (8th Cir., cert. denied, 493 U.S.852, 110 S.Ct. 152 (1989)	5
Harlow v. Fitzgerald, 457 U.S. 800 (1982)	6
Hunter v. Bryant, 112 S.Ct. 534 (1991)	6
Mitchell v. Forsyth, 472 U.S. 511 (1985)	6
Scoggins v. State, 276 Ark. 177, 633 S.W.2d 33 (1982)	5
Seigert v. Gilley, 111 S.Ct. 1789 (1991)	6
State v. Holeman, 103 Wash.2d 426, 693 P.2d 89 (1985)	5
U.S. v. Al-Azzawy, 78 F.2d 890 (9th Cir. 1985)	4, 5, 6
28 U.S.C. §1254(1)	2
42 U.S.C. §1983	2, 4
Fourth Amendment, United States Constitution	3
Fourteenth Amendment, United States Constitution	3

No. _____

_____ ♦ _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

CHARLES K. ELDER,

Petitioner,

v.

R. D. HOLLOWAY, OTHER UNKNOWN EMPLOYEES AND/OR AGENTS, individually and in their official capacity as police officers for the Ada County Sheriff's Office, et al,

Respondents.

_____ ♦ _____

Petition for a Writ of Certiorari To The United States Court of Appeals For the Ninth Circuit

_____ ♦ _____

PETITION FOR A WRIT OF CERTIORARI

_____ ♦ _____

INTRODUCTION

Pursuant to Part III of the Rules of this Court, Charles K. Elder petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The panel Opinion of the Court of Appeals issued in support of its judgment is reported and appears in the Appendix A hereto. The Order and Dissents by the panel denying Appellant's petition for rehearing and rejection of the suggestion for rehearing en banc is reported and appears in the Appendix B hereto.

JURISDICTION

The Court of Appeals entered its Order and Dissents denying Appellant's petition for rehearing and rejection of the suggestion for rehearing en banc on January 27, 1993. This petition is therefore timely under this Court's Rule 13.4. This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

42 U.S.C. §1983:

Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other

proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment

...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law...

STATEMENT OF THE CASE

The underlying factual context of this case is relatively simple. The Defendant police officers surrounded Elder's house in an effort to arrest him without an Idaho warrant. The officers ordered Elder to come out of the house. He did so after suffering epileptic seizures inside. He stood on the threshold of the

doorway and before anyone could reach him, he fell to the ground, suffering a massive subdural hematoma, which ultimately rendered him partially paralyzed.

Elder sued under 42 U.S.C §1983, alleging a Fourth Amendment violation as applied to the States under the Fourteenth Amendment. Essentially, he claimed that he had a right not to be arrested without a valid warrant. The Defendants moved for summary judgment on the grounds of qualified immunity, that is, the law was not clearly established that Elder was arrested inside the home, even though the officers remained outside ordering Elder out. The District Court granted the Defendants' motion, ruling that the law was not clearly established. However, one case directly on point had clearly established the law (United States v. Al-Azzawy, 784 F.2d 890 (9th Cir. 1985)), but was not cited by the parties nor found by the District Court.

The case was appealed to the Ninth Circuit solely on the issue of qualified immunity. The three-member panel conceded that the law was clearly established to the Plaintiff's benefit under Al-Azzawy (supra), but refused to reverse on the ground that the Plaintiff had failed to bear the burden of showing the law was clearly established. In other words, the failure of Plaintiff to cite Al-Azzawy (supra) to the District Court was fatal, even though the legal basis of Plaintiff's claim was clearly established.

Plaintiff then petitioned for rehearing and suggested rehearing en banc. This was denied with a lengthy dissent by Judges Kozinski and Reinhardt.

ARGUMENT FOR ALLOWANCE OF WRIT

By establishing the "Elder rule", which essentially requires the civil rights plaintiff's attorney to cite the established prior case on point or lose on qualified immunity, the panel has decided a federal question in a way that conflicts with applicable decisions of the Court. Thus, this case falls squarely within the criteria of Rule 10.1(c).

Petitioner cannot embellish on the eloquent and prescient dissents of Judges Kozinski and Reinhardt below (Appendix B). These opinions not only outline the flawed reasoning of the panel's decision, but highlight the unfair ramifications of a rule that harshly penalizes the civil rights plaintiff whose attorney has not found the precise case on point.

The fact of the matter is that Petitioner cited three cases on point to the District Court - State v. Holeman, 103 Wash.2d 426, 693 P.2d 89 (1985), Scoggins v. State, 276 Ark. 177, 633 S.W.2d 33 (1982) and Duncan v. Storie, 869 F.2d 1100 (8th Cir., cert. denied, 493 U.S. 852, 110 S.Ct. 152 (1989). Duncan (supra) is particularly germane on the issue of whether the arrestee came outside the home voluntarily, that is, "an individual who is compelled to stand in a doorway cannot be lawfully arrested without the existence of probable cause and exigent circumstance" (Duncan at 1102). This was precisely the situation with Mr. Elder. He was ordered to exit the house and complied with that order. Unfortunately, these authorities were not sufficiently on point for the District Court.

The case of United States v. Al-Azzawy, 784 F.2d 890 (9th Cir.

1985), cert. denied, 476 U.S. 1144 (1986) was sufficiently on point from the viewpoint of the panel. However, this case primarily dealt with the exigent circumstances exception to the warrant requirement - an issue considered by the District Court and deemed to be a matter for jury resolution. Although the legal principle upon which Petitioner rested his case was established by Al-Azzawy (supra), it was not cited or otherwise made known to the District Court. Therefore, Petitioner was unable to rely on it as establishing the law and precluding summary judgment. Thus, the panel's ruling transmogrified the focus of qualified immunity from what was clearly established as the time of the claimed wrongdoing to what authorities were presented to the District Court.

The panel comes to this conclusion by extracting a phrase from Davis v. Scherer, 468 U.S. 183 (1984): "a plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that these rights were clearly established..." (Id. at 197). The panel misinterprets this phraseology as requiring the plaintiff to prove the law as one would prove the facts.

This interpretation is contrary to Harlow v. Fitzgerald, 457 U.S. 800 (1982), Mitchell v. Forsyth, 472 U.S.511 (1985), Seigert v. Gilley, 111 S.Ct. 1789 (1991), Anderson v. Creighton, 483 U.S. 635 (1987) and Hunter v. Bryant, 112 S.Ct. 534 (1991). None of these cases stand for the proposition that a civil rights plaintiff loses if the right case or cases were not submitted to the District Court. The panel treats the showing aspect of Davis (supra) as if

civil rights plaintiffs win or lose on the basis of whether their attorneys submit the right case or cases. This is an absurd approach to the quest for justice.

None of the panel's rationalizations for its bizarre interpretation of the above cases makes any sense. The assertion that courts look to the cases cited by civil rights plaintiffs for a determination of clearly established law adds nothing to the legal inquiry. Backlund v. Barnhart, 778 F.2d 1386 (9th Cir. 1985) noted that the plaintiffs failed to cite pertinent authority, but this did not end the matter. The Backlund (supra) court did not limit its analysis to plaintiffs' cases, but considered a host of other authorities in pursuit of its role as a court.

The so-called analogous rules cited by the panel which penalize a party for not raising a legal issue are not at all of like nature to what is now the Elder rule. For example, the F.R.C.P. 51 requires contemporaneous objections to jury instructions to ensure the court utilizes the correct instruction and prevent the silent party from clamoring error on appeal. The other rules cited by the panel were designed to remedy a specific problem or promote efficient judicial time - none subvert the primary aim of the court system, justice for all, like the newly created Elder rule.

CONCLUSION

The Elder rule as announced by the panel greatly discredits the federal court system. The strained reasoning behind the rule is flawed and unsupported by prior caselaw and makes no sense. Its effect is to greatly diminish the rights of civil rights plaintiffs to have their case heard by a jury and to allow irresponsible governmental officials to escape accountability by the sheer fortuity of whether the right case has been cited as if justice were a grade on a law school exam. The Elder rule should not be left to the lower courts to grapple and distinguish, but overturned directly because the philosophy embodied in it cannot be reconciled with the overall point of legal process - vindicating rights.

For these compelling reasons, this Court should grant Elder's petition and issue a writ of certiorari.

Respectfully submitted,

JOHN C. LYNN
1015 W. Hays Street
Boise, Idaho 83702
(208) 342-7600

Attorney of Record for Petitioner

ORIGINAL

No. 92-8579

In The

SUPREME COURT OF THE UNITED STATES

April Term, 1993

Supreme Court, U.S.
FILED
APR 19 1993
OFFICE OF THE CLERK

RECEIVED
APR 19 1993
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CHARLES K. ELDER,

Petitioner,

v.

RECEIVED
MAY 3 1993
OFFICE OF THE CLERK
SUPREME COURT, U.S.

R. D. HOLLOWAY, OTHER UNKNOWN EMPLOYEES AND/OR AGENTS, individually and in their official capacity as police officers for the Ada County Sheriff's Office, et al,

Respondents.

Petition for a Writ of Certiorari To The United States Court of Appeals For the Ninth Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

John C. Lynn
LYNN, SCOTT, HACKNEY & SULLIVAN
1015 W. Hays Street
Boise, Idaho 83702
Telephone: (208) 342-7600

Counsel of Record for Petitioner

The Petitioner, Charles K. Elder, asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed to forma pauperis. Petitioner has not previously been granted leave to so proceed in both the U. S. District Court and U. S. Court of Appeals. Petitioner's Affidavit in support of this motion is attached hereto.

DATED This 16 day of April, 1993.

LYNN, SCOTT, HACKNEY & SULLIVAN

By: _____
JOHN C. LYNN
1015 W. Hays Street
Boise, Idaho 83702
Telephone: (208) 342-7600

Attorney for Petitioner

No. _____

_____ ♦ _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

CHARLES K. ELDER,

Petitioner,

v.

R. D. HOLLOWAY, OTHER UNKNOWN EMPLOYEES AND/OR AGENTS, individually and in their official capacity as police officers for the Ada County Sheriff's Office, et al,

Respondents.

_____ ♦ _____

Petition for a Writ of Certiorari To The United States Court of Appeals For the Ninth Circuit

_____ ♦ _____

AFFIDAVIT IN SUPPORT OF A MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

_____ ♦ _____

John C. Lynn
LYNN, SCOTT, HACKNEY & SULLIVAN
1015 W. Hays Street
Boise, Idaho 83702
Telephone: (208) 342-7600

Counsel of Record for Petitioner

STATE OF IDAHO)
:ss
County of Ada)

I, CHARLES K. ELDER, Being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of this case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes ____ No _x_

   Petitioner is divorced and not presently employed and is disabled, receiving benefits from the Social Security Administration in the amount of $640.00 per month and from the Veterans' Administration in the amount of $85.0 per month.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other sources?

   Yes _x_ No ____

   Petitioner received approximately $200.00 from PRIDE (Division of Association for Retarded Persons).

3. Do you own any cash or checking or savings account?

   Yes ____ No _x_

   a. If the answer is yes, state the total value of the items owned. N/A

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?

   Yes _x_ No ____

Petitioner owns a 1979 Chrysler Cordova automobile, valued at $300.00.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Rebecca Elder, age twelve, daughter; Social Security provides $268.00 per month because of Petitioner's disability.

I understand that a false statement or answer to any question in this affidavit will subject to me penalties for perjury.

DATED This 15 day of April, 1993.

Charles K. Elder
CHARLES K. ELDER

SUBSCRIBED AND SWORN TO Before me this 15 day of April, 1993.

Notary Public for Idaho
Residence: Meridian ID
My Commission Expires: 1999

DATED This 16 day of April, 1993.

LYNN, SCOTT, HACKNEY & SULLIVAN

By: John C. Lynn
JOHN C. LYNN
1015 W. Hays Street
Boise, Idaho 83702
Telephone: (208) 342-7600

Attorney for Petitioner

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHARLES K. ELDER; BEVERLY S. ELDER, husband and wife,
Plaintiffs-Appellants,
v.
R. D. HOLLOWAY; OTHER UNKNOWN EMPLOYEES AND/OR AGENTS, individually and in their official capacity as police officers for the Ada County Sheriff's Office, et al.,
Defendants-Appellees.

No. 91-35146
D.C. No. CV-88-1329-HLR
OPINION

Appeal from the United States District Court for the District of Idaho
Harold L. Ryan, District Judge, Presiding

Argued and Submitted
October 8, 1991—Seattle, Washington

Filed December 19, 1991

Before: J. Clifford Wallace, Chief Judge, Procter Hug, Jr. and Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Rymer

SUMMARY

Courts and Procedure/Constitutional Law

Affirming a district court grant of summary judgment, the court of appeals held that the grant of summary judgment,

because there are legal authorities that plaintiff did not present to the district court or to us on appeal which suggest that, contrary to what the district court found, the law was clearly established at the time of the incident. Because the plaintiff bears the burden of proof on the issue, we affirm.

After receiving word that Charles Elder, who was wanted on Florida warrants and considered dangerous, was in town, officer R.D. Holloway and others in the Ada County Sheriff's Office made plans to arrest him outside his place of work. Elder [illegible] his brother William got wind of the officers' plans, howev[illegible] left work early, and returned to William's house (where Elder was living, too). Holloway and a number of other officers set up surveillance at the house. When William tried to ride away on horseback, he was detained. Officers found out that Elder had access to weapons in the house. Eventually, Holloway and William made telephone contact with Elder, who meanwhile had suffered two epileptic seizures. Holloway advised him that if he was unable to walk out of the house, he should crawl. Elder walked out a few minutes later, but fell face down, hitting his head and sustaining severe injuries. This happened on April 27, 1987.

Elder's 42 U.S.C. § 1983 action claims these events violated his constitutional right not to be arrested in his home without a valid Idaho warrant. Holloway's motion for summary judgment on the ground of qualified immunity was grante[illegible] cause the court found no Idaho or Ninth Circuit law that ad[illegible]ssed the issue of whether a valid Idaho warrant was necessary to make a "constructive entry" into a home to arrest an occupant.

As the trial judge's memorandum opinion and order notes, Elder cited two cases to the court, *State v. Holeman*, 103 Wash. 2d 426, 693 P.2d 89 (1985), and *Scroggins v. State*, 276 Ark. 177, 633 S.W.2d 33 (1982). Based on these cases and its reading of *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980), the district court concluded

that the law was not clear on the issue of "constructive crossing of the threshold." Accordingly, it ruled in Holloway's favor on qualified immunity.

[1] We have no difficulty with the district court's decision on the record it was presented. Neither case Elder relied upon clearly established whether an arrest takes place inside or outside the home, when the suspect is inside but is summoned outside by law enforcement officers who have surrounded the premises.

[2] There was, however, Ninth Circuit authority, long in place, which is closely on point and could make a difference in the outcome of this case. In *United States v. Al-Azzawy*, 784 F.2d 890 (9th Cir. 1985), *cert. denied*, 476 U.S. 1144, 106 S. Ct. 2255, 90 L. Ed. 2d 700 (1986), police surrounded the suspect's house and, with weapons drawn, ordered him to leave. When he emerged, he was taken into custody. We held that, even though he had exited the house and was physically seized outside, he "was arrested inside his residence without a warrant." *Id.* at 893. In so holding, we reaffirmed the rule that "'it is the location of the arrested person, and not the arresting agents, that determines whether an arrest occurs within a home.'" *Id.* (quoting *United States v. Johnson*, 626 F.2d 753, 757 (9th Cir. 1980), *aff'd on other grounds*, 457 U.S. 537, 102 S. Ct. 2579, 73 L. Ed. 2d 202 (1982)). The Sixth Circuit had also held to the same effect in *United States v. Morgan*, 743 F.2d 1158, 1166-67 (6th Cir. 1984), *cert. denied*, 471 U.S. 1061, 105 S. Ct. 2126, 85 L. Ed. 2d 490 (1985).[1] Thus, that principle was clearly established at the time of Elder's arrest.[2]

[1]The Eighth Circuit is now in accord, *see Duncan v. Storie*, 869 F.2d 1100 (8th Cir.), *cert. denied*, 493 U.S. 852, 110 S. Ct. 152, 107 L. Ed. 2d 110 (1989). However, *Duncan* was handed down after the incident at issue in this case. Therefore, it is not relevant on the question of Holloway's good faith belief, and Elder's reliance on it on appeal is inappropriate.

[2]*Al-Azzawy* went on to hold that exigent circumstances justified the warrantless arrest. 784 F.2d at 894. Holloway urges that no matter what, this renders the law uncertain. Given our disposition, it is not necessary to resolve this question.

BEST AVAILABLE COPY

properly granted, was not to be reversed simply because there were legal authorities not cited by appellant to the district court or to the appeals court suggesting that, contrary to what the district court found, the law was clearly established at the time of the incident.

Appellant Charles K. Elder was ordered out of the place where he was residing through telephone contact by two police officers. Meanwhile, Elder had suffered two epileptic seizur[illegible] One of the officers advised Elder that if he was unabl[illegible] walk out of the house, he should crawl. Elder walked out a few minutes later, but fell face down, hitting his head and sustaining severe injuries. Elder brought a Section 1983 action, claiming these events violated his constitutional right not to be arrested in his home without a valid Idaho warrant. The officer's motion for summary judgment on the ground of qualified immunity was granted because the court found no Idaho or Ninth Circuit law that addressed the issue of whether a valid Idaho warrant was necessary to make a "constructive entry" into a home to arrest an occupant. The district court concluded that the law was not clear on the issue of constructive crossing of the threshold.

[1] Neither case Elder relied upon clearly established whether an arrest takes place inside or outside the home, when the suspect is inside but is summoned outside by law enfo[illegible]ent officers who have surrounded the premises. [2] Howe[illegible], there was Ninth Circuit authority, long in place, that is closely on point and could make a difference in the outcome of this case. In *Al-Azzawy*, the court reaffirmed the rule that it is the location of the arrested person, and not the arresting agents, that determines whether an arrest occurs within a home. [3] Elder did not call this case or others to the attention of the district court. Thus, the court could not now reverse the grant of summary judgment.

[4] First, a Section 1983 plaintiff bears the burden of showing that the constitutional right purportedly violated was

clearly established at the time of the official's conduct. [5] Second, the appeals court never considers facts not presented to the trial court. Similarly, legal issues not raised or ruled upon in the district court are not considered on appeal. [6] Third, to reverse on account of law that could and should have been known to counsel at the time the summary judgment motion was under consideration would violate the spirit of the first rule of the Federal Rules of Civil Procedure. [7] Fourth, given the hybrid nature of the issue, and the fact that the plaintiff has the burden of showing that the law was clearly established, for the court to step in now would have the effect of putting the court on counsel's legal staff. [8] Finally, in this case the court could not say that injustice had occurred. Neither the trial court or counsel found *Al-Azzawy*. Thus, given that failure, the law was sufficiently clear that a reasonable law enforcement officer, like the one in this case, would understand that what he was doing violated a constitutonal right.

COUNSEL

John Charles Lynn, Lynn, Scott & Hackney, Boise, Idaho, for the plaintiffs-appellants.

James J. Davis, Davis, Wright & Tremaine, Boise, Idaho, for the defendants-appellees.

OPINION

RYMER, Circuit Judge:

This appeal raises an unusual question: whether a summary judgment on qualified immunity in favor of a law enforcement officer which was properly granted on the record presented to the district court, should nevertheless be reversed

[3] The problem, of course, is that none of these cases were called to the attention of the district court. The question, therefore, is whether we should now reverse. We conclude that we should not, for the following reasons.

[4] First, we have said that a § 1983 plaintiff bears the burden of showing that the constitutional right purportedly violated was clearly established at the time of the official's conduct. *Baker v. Racansky*, 887 F.2d 183, 186 (9th Cir.). Although the state of the law at the time the incident occurred is a question for the court, rather than a jury, to decide, in the unique context of qualified immunity it is akin to a question of fact. What the law was is inextricably intertwined with the merits of the issue, such that a court cannot properly resolve a police officer's motion for summary judgment without determining whether, on the one hand, the law was clearly established and, on the other, whether the law enforcement official would reasonably have known he was violating the plaintiff's constitutional rights by his conduct on the particular occasion. Unless the plaintiff presents legal authorities that bear on the point, he fails to carry his burden.

[5] Second, it goes without repeating that we never consider *facts* not presented to the district court. *United States v. Elias*, 921 F.2d 870, 874 (9th Cir. 1990). By the same token, we normally do not consider *legal issues* not raised or ruled on in the district court. Examples include those matters that can be urged by way of a Rule 12 motion that are waived unless made with the answer, *see, e.g.*, Fed. R. Civ. P. 12(h)(1) (defenses of lack of personal jurisdiction, improper venue, insufficiency of process, and insufficiency of service of process waived if omitted from pre-answer motion, if any, or answer); *Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir. 1986) (A "general appearance or responsive pleading by a defendant that fails to dispute personal jurisdiction will waive any defect in service or personal jurisdiction."), *amended on other grounds*, 807 F.2d 1514 (9th Cir.), *cert. denied*, 484 U.S. 870, 108 S. Ct. 198, 98 L. Ed. 2d 149 (1987); *Chilicky v. Schweiker*, 796 F.2d 1131, 1135-36 (9th Cir. 1986) (if party files pre-answer motion but fails to raise defense of lack of personal jurisdiction in that motion, defense is waived), *rev'd on other grounds*, 487 U.S. 412, 108 S. Ct. 2460, 101 L. Ed. 2d 370 (1988); issues that could have been joined by a motion for directed verdict, but cannot be pressed on appeal unless that motion is made, *see, e.g., Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1493 (9th Cir. 1986) (sufficiency of evidence not reviewable on appeal unless motion for directed verdict was made in trial court); *United States v. 33.5 Acres of Land*, 789 F.2d 1396, 1400 (9th Cir. 1986) (same, but noting limited exception for plain error resulting in manifest miscarriage of justice); and errors in instructions that are waived unless an objection is timely made or instructions reflecting contrary law are submitted before the jury goes out, *see e.g.*, Fed. R. Civ. P. 51 (no party can challenge jury instructions on appeal unless objection made before jury retires); *Hammer v. Gross*, 932 F.2d 842, 847-48 (9th Cir.) (en banc) (party cannot challenge jury instructions on appeal if not objected to in district court prior to jury retiring; there is no plain error exception to this rule), *cert. denied*, 60 U.S.L.W. 3154 (Dec. 2, 1991). Furthermore, the relevant record on review of summary judgments is the record as it existed at the time the motion was considered. *Harkins Amusement Enter., Inc. v. General Cinema Corp.*, 850 F.2d 477, 482 (9th Cir. 1988), *cert. denied*, 488 U.S. 1019, 109 S. Ct. 817, 102 L. Ed. 2d 806 (1989). We see no meaningful distinction between these procedures and this one.

[6] Third, for us to reverse on account of law that could and should have been known to counsel at the time the summary judgment motion was under consideration would violate the spirit of the first rule of the Federal Rules of Civil Procedure. Rule 1 mandates that the rules "be construed to secure the just, speedy, and inexpensive determination of every action." This includes Rule 56 on summary judgments. In this case, a summary judgment was entered that is arguably erroneous because the person with the burden to do so, failed to find or produce relevant Ninth Circuit authority. Had he done so at the right time and in the right forum, the adverse judgment might have been avoided. So, too, would this appeal. In these circumstances, failing to hold Elder to the case he chose to present would fly in the face of Rule 1.

[7] Fourth, given the hybrid nature of the issue, and the fact that the plaintiff has the burden of showing that the law was clearly established, for us to step in now would have the effect of putting the court on counsel's legal staff. We have great concern that this does not comport with our overriding obligation to be fair and impartial to all sides. More significantly, to reverse because of legal authority not called to the attention of the district court, when the state of the law is the heart of the qualified immunity issue on summary judgment, would necessarily mean that we expect the district court to research independently the applicable law whenever qualified immunity is at issue. While to do so is commendable and encouraged, we are reluctant to require it at the cost of reversible error, at least when the error is not so obvious or fundamental as to result in a denial of due process. To impose this burden on a district judge would put him or her back in the business of practicing law, and to that extent implicates the court's impartiality. *Cf. Jacobsen v. Filler*, 790 F.2d 1362, 1365 n.7 (9th Cir. 1986). It would also shift to the court the burden we have put on the plaintiff. That we are bound not to do. *Pratt v. McCarthy*, 850 F.2d 590, 593 (9th Cir. 1988) (only en banc court has power to reject circuit precedent).

[8] Finally, in this case we cannot say that injustice has occurred. Neither counsel nor the court found *Al-Azzawy*. We are hard pressed to conclude that, given that failure, the law was sufficiently clear that a reasonable law enforcement officer in Holloway's shoes would understand that what he was doing violated a constitutional right.

AFFIRMED.

Judges Reinhardt and Kozinski dissent from the failure of the court to rehear the case en banc.

DISSENTS

KOZINSKI, Circuit Judge, with whom Circuit Judges PREGERSON, NORRIS, REINHARDT and TROTT join, dissenting from the order rejecting the suggestion for rehearing en b.

It is not every day that one witnesses the birth of a totally new legal doctrine. And with good reason. Established legal principles, honed over decades — sometimes centuries — generally have much experience and wisdom behind them. Monumental change should be made only for compelling reasons and after careful consideration of all foreseeable consequences.

Despite the opinion's modest language, the panel here has taken quite an extraordinary step. Simply stated, the panel has held that in raising a pure question of law a party may rely on appeal only on those authorities which it cited to the district court. A court of appeals, in turn, must ignore its own (and the Supreme Court's) controlling case law if it was not cited to the [illegible] below. The panel reaches this result by adding a new term to the argot of jurisprudence: "legal facts." The term is as self-contradictory and nonsensical as the doctrine it supports. Because we can ill afford to maintain this precedent as the law of this circuit, I respectfully dissent from the court's refusal to take this case en banc.

I

The underlying facts are simple: Defendants, all police officers, surrounded Charles Elder's house and ordered him to come out. He did come out and was promptly arrested in front

of his house. Elder sued under 42 U.S.C. § 1983, alleging the police violated his Fourth Amendment right to not be arrested in his home without a valid warrant. Defendants moved for summary judgment claiming qualified immunity. To overcome the immunity defense, plaintiff cited a variety of cases to demonstrate that the specific Fourth Amendment right he sued on was clearly established. None of the cases was directly on point, and the district court granted defendants' motion. Unknown to the parties and the district court was *United States v. Al-Azzawy*, 784 F.2d 890 (9th Cir. 1985), *cert. denied*, 476 U.S. 1144 (1986), which showed that the "principle [on which plaintiff rested his case] was clearly established at the time of Elder's arrest." *Elder v. Holloway*, 951 F.2d 1112, 1114 (9th Cir. 1991) (previous version of this opinion).[1]

Whether the right was clearly established at the time of the incident, the majority recognizes, is a "pure question of law." *Elder v. Holloway*, 975 F.2d 1388, 1392 (9th Cir. 1992) (quoting *Romero v. Kitsap County*, 931 F.2d 624, 627-28 (9th Cir. 1991)). It is, of course, well understood that questions of law are reviewed by us de novo, giving no deference to the ruling of the district court. *Pierce v. Underwood*, 487 U.S. 552, 557 (1988); *Bose Corp. v. Consumers Union*, 466 U.S. 485, 501 (1984); *United States v. Silverman*, 861 F.2d 571,

[1]The panel omits this statement from the more recent version of its opinion, but it does nothing to controvert it. This is quite understandable. *Al-Azzawy* is on all fours with this case; our statement that "it is the location of the arrested person, and not the arresting agents, that determines whether an arrest occurs within a home," *Al-Azzawy*, 784 F.2d at 893, was clear, and it applies directly to the claim of qualified immunity raised by the defendants here. Its applicability is undiminished by the panel's suggestion that it "may be regarded as dicta." *Elder*, 975 F.2d at 1391. In fact, the majority's reliance on its newly invented doctrine can only be understood as recognizing that *Al-Azzawy* does make a difference. After all, if *Al-Azzawy* did not change the legal landscape enough to defeat a claim of qualified immunity, it would have been far simpler to dispose of the case on that basis.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHARLES K. ELDER; BEVERLY S. ELDER, husband and wife,
Plaintiffs-Appellants,
v.
R. D. HOLLOWAY; OTHER UNKNOWN EMPLOYEES AND/OR AGENTS, individually and in their official capacity as police officers for the Ada County Sheriff's Office, et al.,
Defendants-Appellees.

No. 91-35146
D.C. No. CV-88-1329-HLR
ORDER AND DISSENTS

Filed January 27, 1993

Before: J. Clifford Wallace, Chief Judge, Procter Hug, Jr. and Pamela Ann Rymer, Circuit Judges.

Dissents by Judges Kozinski and Reinhardt

ORDER

The panel has voted to deny appellants' petition for rehearing and to reject the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX B

court and the court renders its determination after making an independent assessment of what the law is.

II

We are told that the blind man, when handed the elephant's tail, concluded that the creature looked like a rope. So does the panel err in building a whole theory of qualified immunity law on a paragraph dangling at the end of *Davis v. Scherer*, 468 U.S. 183 (1984). There the Court stated: "A plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only *by showing* that those rights were clearly established at the time of the conduct at issue." *Id.* at 197 (emphasis added). The panel reads the phrase "by showing" as setting a requirement that the clearly established law be proved as one typically proves fact — the way one would show that the light was red or that the banana peel was dark and gritty. But that is not a plausible reading of the Supreme Court's language. Because the Court has elsewhere made it clear that whether a right is clearly established is a question of law, the term "showing" must be construed as it applies to legal issues. The way a party demonstrates (or shows) that it should prevail in its legal argument is by citation and argument (which are judged only after a court has made an independent examination of the law), not by testimony and documentary proof.

Had the Court meant to adopt the rule that legal issues in qualified immunity cases are to be proved as facts, it would surely have used clearer language to explain what it was doing. It would not have adopted a major change like this merely by using the word "showing" and then hoping the lower courts would notice its word choice and make the connection — a connection no court actually made for eight years, until this panel suddenly perceived it. The Court would have also provided some rationale or explanation for adopting such a startling new rule. It certainly would not have adopted it without any discussion at all.

A. To understand the significance of the phrase on which the panel relies we must consider it in the context of both the entire *Davis* opinion and the legal backdrop against which it was placed. I start by noting that *Davis* never purported to alter the objective test for qualified immunity first announced in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). *Davis* applied the test unchanged, quoting it in full before it went through its qualified immunity analysis. *See Davis*, 468 U.S. at 191 (quoting *Harlow*, 457 U.S. at 818). This express restatement of *Harlow* shows that the concluding paragraph in *Davis* — a brief epilogue restating the qualified immunity test — meant simply to reassert *Harlow*, not alter it.[3]

Harlow held that government officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818. This "qualified immunity defense depends upon the 'objective reasonableness of [the defendant official's] conduct as measured by reference to clearly established law.' No other circumstances are relevant . . . ." *Davis*, 468 U.S. at 191 (citation omitted) (quoting *Harlow*, 457 U.S. at 818). Two aspects of the *Harlow* test call into question the panel's reading of *Davis*.

First, *Harlow* says nothing about the plaintiff having to prove up the law; in fact, it clearly intends that the court make an independent determination of the law: "On summary judgment, the *judge appropriately may determine*, not only the currently applicable law, but *whether the law was clearly established* at the time an action occurred." 457 U.S. at 818 (emphasis added). Thus, *Harlow* gave the court the responsibility to determine whether the law was clearly established. Neither *Harlow* nor *Davis* ever indicated that the plaintiff is

[3]In fact, *Davis* clarified *Harlow*; I take that up below. *See* pp. 586-87 *infra*.

576 (9th Cir. 1988) ("Under the de novo standard of review, we do not defer to the lower court's ruling but freely consider the matter anew, as if no decision had been rendered below.").

The reason for de novo review of legal questions is obvious enough: We are in a better position than the district court to resolve legal questions. We "are not encumbered, as are trial judges, by the vital, but time-consuming, process of hearing evidence." *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984). We see many legal issues repeatedly, giving us a greater familiarity with the subject matter. We also have the advantage of sitting in panels where we can deliberate about legal issues. Even the en banc process (which failed us here) lets us talk to each other about issues that the district court must decide alone.

When it comes to facts, however, the district court has an institutional advantage. It can observe witnesses, hear their testimony, and see and touch the physical evidence. Our review of questions of fact is therefore very limited. This leaves resolving questions of law — if necessary, by writing opinions that refine, clarify and develop existing legal doctrines — as our principal mission.

In these defined areas of responsibility, the panel's holding is a true anomaly. According to the panel, because the plaintiff in a qualified immunity case has the burden of showing the defendant violated clearly established law, the relevant law on that point becomes a fact — a legal fact — which the plaintiff must prove up in the district court. But there is nothing about qualified immunity that requires or permits treating the law as fact. Facts by their nature are case specific. They must be proven through witnesses or documentary evidence; the proof is subject to skeptical review by the trier of fact who may not accept all that is put in front of him. Law is external to any particular case; it is not subject to evaluation by the trier of fact; it can be raised for the first time on appeal

because it need not — cannot — be established by use of percipient witnesses or documentary evidence.

Every issue in every case turns on both fact and law; facts outside a legal framework are as irrelevant as abstract legal principles. When we say, for example, that the plaintiff must prove certain facts at trial, we mean he must first establish what the law is and then conform his proof to the applicable legal standard.[2] If the plaintiff misunderstands the law, he may well prove up the wrong set of facts. The failure to get the law right in such a case may then be fatal, not because law is fact, but because a party can't supplement the record on appeal once it discovers that it missed the legal target in the district court. It is quite another matter to say, as the panel does, that even though the facts proved in the district court would be sufficient to defeat a claim of qualified immunity under the existing law, the party might lose because it forgot to cite the correct case below.

The panel's misguided ruling shifts the focus of the qualified immunity inquiry from the clarity of the law actually violated by the defendants to the clarity of the law as presented by the plaintiff to the district court. Thus, under the panel's opinion, a government official's conduct is not evaluated under the standard announced by the Supreme Court — *the clearly established law* at the time the official acted — but on the basis of what case law the plaintiff's lawyer managed to dredge up and cite below. This is a drastic departure from the way questions of law are decided and reviewed in our system, where the adversaries present their versions of the law to the

[2]If it turns out that the plaintiff misunderstands the law and, as a consequence, misleads the district court, we may well limit the scope of our judicial review. *See* pp. 592-94 *infra*. But we most assuredly do not say that the plaintiff has failed to meet his burden of proof because he did not cite a particular case to the district court; we certainly do not say that the appeal *must* be determined as if no other law existed than what was cited to the district court.

appeal. 472 U.S. at 527. In holding that an immunity determination was a separate right, the Supreme Court explained the role of an appellate court in reviewing a qualified immunity claim:

> An appellate court reviewing the denial of defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even decide whether the plaintiff's allegations actually state a claim. *All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions* . . . . To be sure, the resolution of these legal issues will entail *consideration of the factual allegations that make up the plaintiff's claim for relief* . . . . [T]he Court has recognized that a question of immunity is separate from the merits of the underlying action for purposes of the *Cohen* test even though a reviewing court *must consider the plaintiff's factual allegations in resolving the immunity issue.*

472 U.S. at 528-29 (emphasis added). *Mitchell* makes clear that the court considers "the factual allegations that make up the plaintiff's claim," not the factual allegations plus the limited "universe of statutory or decisional law" presented to the district court. *See* 975 F.2d at 1392. There is no hint in *Mitchell*'s formula that a reviewing court should analyze anything other than the allegations of official misconduct — *factual* allegations — presented to the district court when determining whether the conduct violated clearly established law.

In *Siegert v. Gilley*, 111 S. Ct. 1789 (1991), despite a three-way split on the merits, the Justices agreed on one point: It was the *facts* Siegert alleged, not any particular cases he happened to cite — or not cite — in support of his claim, that mattered for purposes of deciding the qualified immunity question. The Justices seemed perfectly willing to use their own resources to determine and explain what the law was. The majority wrote: "The *facts alleged* by Siegert cannot, in the light of our decision in *Paul v. Davis* be held to state a claim for denial of a constitutional right." *Id.* at 1794 (emphasis added). Focusing on the malice element requisite to Siegert's constitutional claim, Justice Kennedy said: "Upon the assertion of a qualified immunity defense the plaintiff must put forward specific, nonconclusory *factual allegations* which establish malice, or face dismissal. . . . In my view petitioner did not meet the burden of *alleging facts* from which malice could be inferred by other than the most conclusory allegations." *Id.* at 1795 (emphasis added). The dissent said something very similar: "The majority contends that Siegert has not alleged the violation of any 'right,' 'clearly established' or otherwise. In my view, there can be no doubt that *the conduct alleged* deprived Siegert of a protected liberty interest and that this right was clearly established at the time Gilley wrote his letter. Siegert's claim, therefore should surmount Gilley's assertion of qualified immunity." *Id.* at 1797 (emphasis added) (Marshall, J., dissenting). Not one of the opinions purported to limit its analysis to the cases cited by Siegert to the district court. The phrase "legal facts" appears nowhere in the opinion.

Other post-*Davis* Supreme Court qualified immunity cases follow the same pattern. *See, e.g., Anderson v. Creighton*, 483 U.S. 635 (1987); *Hunter v. Bryant*, 112 S. Ct. 534 (1991). In none of the Court's qualified immunity analyses is there support for the panel's rule that a section 1983 (or *Bivens*) plaintiff loses on appeal if, though his factual allegations show a violation of clearly established law, he did not cite the right case to the district court to prove that the law was clearly established. Of course, in trying to persuade the court, a plaintiff will want to cite precedents that support his claim that the law the defendant violated was clear. But this doesn't mean the district court (or we on appeal) "has no obligation," *see* 975 F.2d at 1396, to determine on its own "whether [the] law

obligated to prove up the law or that he waives any authorities not presented to the district court.

Second, the panel's rule is inconsistent with the rationale underlying the *Harlow* test. *Harlow* shifted the inquiry in qualified immunity cases from the subjective good faith of the government officials to the objective reasonableness of their conduct in light of clearly established law. *See id.* at 816-17. The Court settled on this objective test because "[t]he public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts." *Id.* at 819. The line *Harlow* drew was clear: "Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action." *Id.* at 819. Essential to this inquiry is that the official's conduct be judged against an objective standard — the law as it actually was, not as the official thought it was, or as the plaintiff proves it to be. *Harlow* doesn't say that "officials should be made to hesitate" when plaintiff can cite a case that says they should. Rather, the deterrence is supposed to operate whenever officials *in fact* transgress the actual clear boundaries of the law. *Davis* did nothing to move the inquiry off this fixed reference point.

By misreading *Davis*, the panel bypasses a far more natural interpretation of the relevant language — an interpretation based on the analysis in the body of the opinion. The precise question faced in *Davis* — something the panel never mentions — was whether an immunity defense could be defeated on the ground that the official violated *state* law. The Court answered this question in the negative, but it didn't stop there. *Davis* went on to hold that the violation of clearly established law relevant to the immunity determination must be the same violation as that on which the plaintiff rests his section 1983 claim. In other words, a plaintiff suing for violation of a specific Fourth Amendment right may only defeat the immunity claim if that very Fourth Amendment right was the clearly established one.

With this holding in mind, the meaning of the passage that confuses the panel becomes clear. Consider again the language: "A plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that *those rights* were clearly established at the time of the conduct at issue." 468 U.S. at 197 (emphasis added). The Court is merely restating its holding by emphasizing that to defeat a qualified immunity claim there must be an identity between the sued-on right and the clearly established right. The language was meant to prevent future plaintiffs from trying, as Scherer did, to sue on one right and to overcome the immunity by showing that some other rights were clearly established. This was the whole point of *Davis*, and the language the panel relies on here merely summarizes this ruling. It is normal practice to restate holdings in conclusions; it is far from normal for a conclusion to make a substantive legal change that is not even considered in the body of the opinion.

B. That *Davis* was not the watershed opinion the panel here reads it to be is evident from the Supreme Court's subsequent qualified immunity decisions. None of these decisions even hint at a requirement that the plaintiff must prove up the law by pleading legal facts. To the contrary, the Court has continued to draw clear distinctions between questions of law and questions of fact.

In *Mitchell v. Forsyth*, 472 U.S. 511, 524-30 (1985), the Court dissected a qualified immunity claim to determine whether a denial of immunity was an appealable order under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The Court considered the nature of an immunity claim in applying the *Cohen* requirement that a claim of right must be "separable from, and collateral to, rights asserted" in the underlying action in order to be appealable in an interlocutory

immunity determinations, the analogy would cut against the panel.

But the analogy just isn't there. The purpose of Rule 51 is to require timely objections to instructions so the trial judge has a chance to change them before the jury retires to consider its verdict. Without it, a party who fails to object to a defective instruction would get two bites at the apple. If the party gets a favorable verdict despite the bad instruction, it wins; if the verdict is unfavorable, the party still has a shot at a new trial appealing on the ground that the instruction was defective. Moreover, the cost of an appellate reversal based on faulty jury instructions — a completely new trial — is obviously very high. With motions for summary judgment based on qualified immunity, on the other hand, there is no incentive to sandbag by failing to point out favorable cases, and the costs of a reversal on an appeal from summary judgment are relatively small.

Equally unhelpful are the other rules the panel cites as supposed analogies. 975 F.2d at 1395 n.4. Each deals with a particular eddy away from the procedural mainstream; none supports the rule adopted here. Rule 12(h)(1), for example, is a procedural tripwire designed to ensure that certain key issues are raised at the very earliest stage of the litigation. Like Rule 51, it embodies an exception, and suggests, if anything, that the opposite is the general rule. In any event, the waiver set up by this rule is limited: It applies to certain, largely factual, defenses each of which is listed within the rule itself. Anyone who files an answer and does not list one of these defenses can fairly be deemed to have waived it; it is a far different matter to say that a plaintiff waives every case in F.2d and the U.S. Reports if he does not mention it in an opposition to a summary judgment motion. The remaining three rules — issues not raised by motion for directed verdict cannot be raised on appeal; facts (factual facts, not legal facts) not presented to the district court cannot be raised on appeal; and review of summary judgment is based on the record as it

existed at the time the motion was considered — all deal with facts, which are within the peculiar competence of the district courts.

For reasons discussed above, *see* pp. 582-84 *supra*, there is simply no analogizing questions of law to questions of fact. Calling it legal fact simply can't, by some peculiar alchemy, turn law into fact. Despite several strained attempts, the panel can find no solid analogy that supports a general rule of waiver of a question of law. This should be an important clue that what we have here is a bold departure from sound and established practice.

IV

The panel's novel rule will serve no one well. Ordinarily, the correct legal result does justice between the parties. By requiring us to ignore the controlling legal precedents and to affirm incorrect legal results, the panel's opinion may require us to affirm many unfair outcomes. The chaotic effects of the panel's rule will not be visited solely on plaintiffs. The government frequently cites cases which run against the general weight of authority in order to show that law which appears to be clearly established is actually muddy. Under *Elder*, if the government fails to cite such a case to the district court, the district court would presumably be free to ignore it, and we would be powerless to reverse the unjust imposition of liability on a government officer.

The panel's ruling also puts attorneys in an extremely awkward position. Under established ethical principles, counsel is required to cite to the district court all binding authorities, not only the favorable ones. Model Rules of Professional Conduct, Rule 3.3(a)(3); Model Code of Professional Responsibility, DR 7-106(B)(1). The same is not true as to facts: A lawyer need not introduce evidence that will defeat his client's claim; it may well be malpractice to do so. But what is a lawyer to do with legal facts? If the majority opinion is read

was clearly established at the time [the] action occurred," *Harlow*, 457 U.S at 818. The court's job is to determine the rights of the parties, not to grade motion papers.

III

In an effort to bring its novel theory into the doctrinal mainstream, the panel points to a variety of rules and practices that, it argues, provide support for its approach. None, in fact, do so.

A. The panel offers this revelation: "While most of our qualified immunity opinions make no mention of who came up with the relevant authority, we have in practice looked to the cases cited by the plaintiff." 975 F.2d at 1393. Of course we have. Much of the time the plaintiff does cite all the relevant cases, so referring to the "cases plaintiff cites" is a useful means of pinpointing a successful argument or rejecting an unsuccessful one. Often we refer to the cases cited by the parties to fulfill our duty to render reasoned decisions that assure the litigants their claims have been given careful consideration. Referring to "the cases the plaintiff cites" is a turn of phrase, not a legal doctrine.

Never have we felt limited to considering only those cases plaintiff cites. *Backlund v. Barnhart*, 778 F.2d 1386 (9th Cir. 1985) — the panel's own showpiece precedent — is a good example: In *Backlund*, the court did note that plaintiffs "fail to cite any pertinent authority" to establish a violated right, *id.* at 1389, but it didn't end its analysis there. Rather, it went on to say: "Nor can [plaintiffs cite any relevant authority], for the following reasons." *Id.* At that point, the court launched into a full-scale analysis of the relevant point of law, without ever hinting that its inquiry was somehow limited by the authorities cited by the plaintiff. Had the *Backlund* court felt itself bound by the cases cited by the plaintiff, all this discussion would have been unnecessary.

Many other qualified immunity cases explicitly go beyond the "universe of authorities" cited by the plaintiff. *See, e.g., Mendoza v. Blodgett*, 960 F.2d 1425, 1431 (9th Cir. 1992) ("No case . . . has been cited to us, *nor have we found any* . . . .") (emphasis added), *petitions for cert. filed*, 61 U.S.L.W. 3303 (Aug. 28, 1992) (No. 92-579) and ___ U.S.L.W. ___ (Nov. 2, 1992) (No. 92-6560); *Maraziti v. First Interstate Bank of California*, 953 F.2d 520, 523 (9th Cir. 1992) ("Maraziti cites no cases, *and we have found none* . . . .") (emphasis added); *Alexander v. Perrill*, 916 F.2d 1392, 1398 (9th Cir. 1990) ("a similar issue [was] previously litigated and decided in [the plaintiff's] favor — *a case which inexplicably both parties failed to cite in their briefs*") (emphasis added). The careful effort in these cases to seek out and consider authorities not cited by the parties is entirely consistent with what I understand to be our role as judges. The panel's ostrich-like insistence that authorities not cited by the plaintiff in the district court may not be considered on appeal is at odds with this body of case law.

B. The panel also cites a variety of rules which penalize a party for failing to raise a legal issue before the district court. 975 F.2d at 1394-95 & n.4. But none of these is actually analogous; none justifies the panel's doctrinal leap.

The panel's principal analogy is to the rule that we will not normally reverse because of an incorrect jury instruction where the party claiming error did not object. But the Federal Rules of Civil Procedure expressly deal with the question of how jury instruction may be reviewed on appeal: "No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." Fed. R. Civ. Proc. 51. That the drafters felt it necessary to have a special rule governing this issue suggests that this is the exception from the normal practice. If one could analogize jury instructions to qualified

1201, 1203 (9th Cir. 1989). Applying an unprecedented rule of strict construction to a category of cases where we have a tradition of going out of our way to reach the merits is the sort of procedural legerdemain that might make sense to those trained in the law, but it does nothing to enhance public confidence in our federal courts.

In sum, the panel has lost sight of the fundamental issue in a section 1983 case: whether or not the officials in question violated the rights of citizens. Qualified immunity diminishes somewhat the remedies afforded by law to the allegedly wronged individual, but the standards for a grant of immunity reflect a careful balancing process that takes great pains to protect the plaintiff's substantive rights. In defining qualified immunities, each rule must be judged both in terms of how well it protects the substantive right conferred by the statute, and of how much breathing room it gives government officials who must make hard decisions while performing discretionary functions. The panel's rule does nothing at all to help government officials discharge their responsibilities; its only effect is to diminish the rights of aggrieved plaintiffs. This is hardly the type of balancing the Court has said we must perform in adjudicating civil rights cases.

Conclusion

All those who enter the Supreme Court building are greeted by the words "Equal Justice Under Law." All too often this is only an aspiration. A party's success sometimes depends as much on the skill of his lawyer as on the strength of his case. But the panel here has taken what was heretofore only a necessary evil and elevated it to a rule of law.

Because I believe the panel has taken a giant step in the wrong direction in a very important area of the law, and that it is incumbent on us as a court to correct the error, I respectfully dissent from the order rejecting the suggestion for rehearing en banc.

REINHARDT, Circuit Judge, with whom Circuit Judge Pregerson joins, dissenting from the order rejecting the suggestion for rehearing en banc.

I join Judge Kozinski's excellent, if understated, dissent, and write separately to emphasize one or two additional points. First and foremost — it is civil rights plaintiffs who once again are the object of hostile and discriminatory treatment by the federal courts. *Elder* sets forth the rule that, in considering a civil rights plaintiff's challenge to a state official's qualified immunity defense, appellate courts may not consider cases or precedents which the plaintiff failed to cite to the district court. As Judge Kozinski politely suggests, this is a limitation on appellate review previously unknown in the annals of Anglo-Saxon jurisprudence.

It remains to be seen whether the same bizarre rule will be applied when *defendants* fail to cite cases to the district court — but even if it is, it is clear that in the vast majority of instances, civil rights plaintiffs will bear the brunt of the *Elder* doctrine. First, plaintiffs are obliged by the nature of the principles governing qualified immunity to rely more heavily on case law than are defendants. The primary means open to a plaintiff to demonstrate the clarity of the law violated by a state official, and thus to overcome a qualified immunity defense, is the citation of past cases which have established a given rule or legal principle. Defendants, by contrast, may rely simply on the *absence* of cases clearly establishing the relevant law. Defendants are therefore far less likely to fall victim to a rule which harshly penalizes the omission of a citation. Second, civil rights plaintiffs are at a substantial disadvantage with respect to legal resources. While civil rights defendants are generally represented by a legal office composed of a large number of state or local government attorneys, the overwhelming majority of civil rights plaintiffs are unable to obtain comparable representation. Few are in a position to hire a prestigious law firm with a raft of partners and associates, and only a small number obtain representation by

literally, it would seem counsel would have the right — or even the duty — to keep to himself any case law (i.e., any legal facts) which help the other side. Encouraging such fraud on our district courts will neither make the job of district judges easier nor heighten the level of professional ethics among lawyers.

Finally, the panel's ruling will make it nearly impossible for us to develop a workable body of case law dealing with qualified immunity. Under the panel's opinion, decisions on qualified immunity issues merely represent factual findings based on the "record of authorities" presented to the district court. 975 F.2d at 1394. Every qualified immunity decision will be limited to its particular "facts," a term now defined to include the cited cases. Even if we were to begin the peculiar practice of including in our opinions a list of all the precedents cited to the district court, a given decision would only bind panels reviewing cases in which an identical list of authorities was presented below. Our decisions will no longer say what the clearly established law is, but only whether certain cited cases are sufficient, standing alone, to clearly establish the law. The panel opinion would therefore make it exceedingly difficult, if not impossible, to develop a jurisprudence of what constitutes "clearly established law," and would thereby "Balkaniz[e] the rule of qualified immunity" law — exactly what the Supreme Court wants to avoid. *Anderson v. Creighton*, 483 U.S. 635, 646 (1987).

V

The panel's approach, wrong though it be, does have some intuitive appeal. After all, doesn't fairness to the district judge require that we view the case as he did? Who among us has not felt somewhat betrayed when we were reversed based on an argument not fairly presented to us? "Ah," we may have thought, "had they but put the matter *that* way, I could well have avoided the error."

But the judicial process isn't about fairness to judges; it's about fairness to the parties. While we often speak in terms of "fairly" presenting a matter to the district court, *see, e.g., Royal Printing Co. v. Kimberly-Clark Corp.*, 621 F.2d 323, 328 n.9 (9th Cir. 1980), we do not mean that the court is somehow disadvantaged because a matter was not fairly presented to it. Properly phrased, the question is: Was the matter presented to the district court in a manner fair to the opposing side?

When the question not raised below is factual in nature — which usually means, among other things, that it is peculiarly within the province of one of the parties — we generally say it is not fairly raised if not presented to the court that has competence over factual matters. This stems from the institutional need to build a record before judicial review can be exercised on appeal. But with questions of law, we deem the matter fairly raised if the issue is presented to the district court; citation to a particular case has never been seen as part and parcel of fairly raising the issue below. The district court can, after all, find cases not cited by one party, and the opposing party has the obligation to help the court by presenting relevant precedent to it. Punishing one party so severely for its failure to exhaust all potentially relevant authority may well help district court judges get rid of cases, and give a windfall to parties lucky enough to come across a weak adversary, but it is hardly fair. Determining the law is, after all, a shared responsibility to be borne by the court and the litigants. Where the district judge misses a key precedent and therefore renders an erroneous ruling, the consequences of that error should not be visited entirely on one of the parties.

Finally, the panel's contrary result is also hard to square with our long-standing rule requiring liberal constructions of pleadings in civil rights cases. *See, e.g., Buckey v. County of Los Angeles*, 968 F.2d 791, 794 (9th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3287, 3314, 3394, 3400 (Nov. 30, 1992) (Nos. 92-560 & 92-628); *Gobel v. Maricopa County*, 867 F.2d

ceedings, I think the public, the bar, and the district judges would benefit from knowing the breakdown of the actual vote. For reasons I am not free to reveal, I believe that in the case before us disclosure of the vote would be particularly informative. For that reason, I am especially uncomfortable with the application of our secrecy rule; I will, however, comply with its dictates.

I can conceive of only one good reason for any of my colleagues to have voted against an en banc hearing in this case: because they believe that *Elder* can or will be sharply limited, and they therefore find it unworthy of en banc consideration. *Elder* is certainly susceptible to a future reading that leaves it with little or no significance. The panel only applied its novel rule after expressly stating that doing so would not result in an injustice. *See Elder*, 975 F.2d at 1396. According to the panel, its holding does no injustice to Elder because consideration of the precedent which Elder failed to cite — *U.S. v. Al-Azzawy*[3] — would have made no difference to the outcome of his case. The panel said that even considering *Al-Azzawy*:

> . . . we are hard pressed to say that the law was so clearly established that a reasonable law enforcement officer in Holloway's shoes would understand that what he was doing violated a constitutional right. *See Ward v. County of San Diego*, 791 F.2d 1329, 1332 (9th Cir. 1986) (the court does not "require of most government officials the kind of legal scholarship normally associated with law professors and academicians"), *cert. denied*, 483 U.S. 1020, 107 S. Ct. 3263, 97 L. Ed. 2d 762 (1987).

Id.

In light of the panel's implicit admission that the result in *Elder* would have been the same with or without the proclamation of its novel rule, it is tempting to dismiss the rule as mere *dicta*. That may be difficult to do here, however, because the rule appears to constitute the raison d'etre for the opinion. Nevertheless, future panels may well conclude that the *Elder* rule should not be invoked if doing so would lead to an unjust result — specifically, if its application would cause a civil rights plaintiff who would otherwise prevail to lose his case.[4]

Perhaps it is impatience that prevents me from simply awaiting that result. Doing so might well ensure a peaceful, dignified burial for the bizarre *Elder* rule. However, like Judge Kozinski, I do not believe it is appropriate to let a case which promulgates so glaring an error in so important an area of the law go unchallenged. Rather, I believe that, considering how significantly the *Elder* decision conflicts with precedent, practice, and our obligation to vindicate constitutional rights, we have a duty to correct the panel's error now. I believe we breach that duty by failing to take the case en banc. Thus, for the reasons I have expressed, and for those ably articulated by Judge Kozinski, I dissent from the order denying en banc review.

[3]784 F.2d 890 (9th Cir. 1985), *cert. denied*, 476 U.S. 1144 (1986).

[4]Judge Kozinski argues at n.1 of his dissent that, despite the language of the opinion, *Elder* cannot be interpreted to hold that the panel would have reached the same result if *U.S. v. Al-Azzawy* had been cited to the district court. He bases his argument on *his own* interpretation of *Al-Azzawy* and on the observation that it would be improper and illogical to invent a completely new legal doctrine in order to avoid considering a non-controlling case. Even if Judge Kozinski is correct that, properly construed, *Al-Azzawy* would require reversal of the district court, that cannot change the fact that the panel's view of *Al-Azzawy* was different. It was the panel's view that *Al-Azzawy* did not clearly establish the law, and it was on the basis of that interpretation of *Al-Azzawy* that the panel determined to apply its rule, believing that the result would not be affected. Thus, it is the panel's interpretation of *Al-Azzawy* that we must accept in construing its holding — not Judge Kozinski's. Similarly, that it was improper or illogical for the panel to promulgate a new legal rule under the circumstances present here does not change the fact that the panel did so. We cannot say that because the panel acted illogically or improperly, its opinion does not mean what its language plainly states.

an organization with a permanent legal staff of any size. Instead, the victims of civil rights violations must generally rely on lawyers who work in small law offices or as sole practitioners. These lawyers are usually overburdened and rarely have access to the resources and facilities available to the average attorney representing corporate or governmental clients. They are consequently more apt to miss a case than are their governmental opponents. In sum, while we do not yet know whether *Elder* is even *formally* neutral between civil rights plaintiffs and defendants, it is evident that as a practical matter it is not, and that it is the plaintiffs who will ordinarily fall victim to its inequitable strictures.

I emphasize that no other litigant — whether suing for an antitrust, tort, contract, or copyright violation — risks forfeiture of his right to have the controlling law applied to his case simply because he neglects to cite the appropriate precedent in the district court. For all other litigants, and in all other circuits, the law is the law, *regardless* of the citation of cases below and *regardless* of the quality of the plaintiff's lawyer; for a Ninth Circuit civil rights plaintiff faced with a qualified immunity defense, however, the law is only controlling if his lawyer brings the particular case to the attention of the district court. Only in a civil rights case and only in our circuit can the failure to cite a particular decision render a federal appellate court powerless to provide a remedy for a blatantly unconstitutional act. Civil rights victims in the Ninth Circuit will thus be doubly victimized: first by a state or local official's violation of their constitutional rights; next when they seek to recover the damages to which they are entitled.

In this case, the panel may not invoke the familiar mantra that the result it reaches, however unjust, is ordained by precedent. No court has ever before concluded that decisional law is *lex non grata* or *loi disparu* if not cited to the district court, nor has any court ever before recognized the existence of the hybrid entity which the panel oxymoronically labels "legal fact." On the contrary, in at least three cases our court

has expressly acknowledged its obligation to look beyond the cases cited by the parties in analyzing qualified immunity issues. *See* Kozinski, J., dissenting *supra* at 591. That the panel is itself solely responsible for the establishment of the paradoxical *Elder* rule is further evident from the fact that the rule was neither proposed nor discussed by the parties in their briefs. The panel's *sua sponte* invention of a rule which seriously disadvantages civil rights plaintiffs displays a disregard both for precedent and for the rights of the individuals involved.[1]

As Judge Kozinski notes, our en banc process is imperfect. In this respect it is no different from other judicial, governmental, or electoral processes. Misfires occur in all walks of life. However, one aspect of the error we commit here is unique. Under our rules, when we decide not to go en banc, the public is prohibited from learning how the court divided over the issue. The public is even prohibited from learning whether a majority of the court voted against en banc review.[2] The secrecy surrounding our en banc procedure is unhealthy. *See discussion in Harris v. Vasquez*, 949 F.2d 1497, 1539 (9th Cir. 1990) (Reinhardt, J., dissenting), *cert. denied*, 112 S. Ct. 1275 (1992). As in *Harris*, and as in all other en banc pro-

[1]There is little comfort that an adherent of constitutional rights can take from *Elder*. It is worth noting, however, that while the panel attempts to tie our hands, it has *not* sought to change the district court's traditional role. Even under *Elder*, district courts knowledgeable in the law will continue to apply the relevant law whether or not it has been cited by the plaintiff. *See Elder*, 975 F.2d at 1396.

[2]In our circuit, an en banc call can be defeated even when a majority of the court does not vote against an en banc hearing. En banc review occurs only when an absolute majority of active judges votes in the affirmative. Thus, a tie vote will always defeat an en banc call. Similarly, a call will fail if a majority of those voting cast a "yes" vote but the "yes" votes do not outnumber the combined "no" votes and abstentions. *See generally Harris v. Vasquez*, 949 F.2d at 1539.

I should add that even where, as here, a dissent from an order denying en banc review is filed, the public cannot tell how many judges favored an en banc hearing. Judges who vote in favor of en banc review frequently do not join the dissent.

LYNN, SCOTT & HACKNEY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

CHARLES K. ELDER and BEVERLY S. ELDER, husband and wife, Plaintiffs, v. R. D. HOLLOWAY, AND OTHER UNKNOWN EMPLOYEES AND AGENTS individually, and in their official capacity as police officers for the Ada County Sheriff's Office; VAUGHN KILLEEN, as Sheriff of Ada County; and the COUNTY OF ADA, Defendants.	)	CIVIL NO. 88-1329 **MEMORANDUM OPINION AND ORDER**

I. FACTS AND PROCEDURE

This suit arises out of the arrest and seizure of the plaintiff, Charles Elder, on April 27, 1987. The defendants in this action are Lieutenant R. D. Holloway, the officer in charge of the arrest, Ada County Sheriff Vaughn Killeen, who was present during the arrest, the County of Ada, and other unknown employees and/or agents. After receiving certified copies of two Florida arrest warrants for the arrest of Mr. Elder, Defendant Holloway made arrangements to arrest Mr. Elder in a public place, his place of work. However, before Mr. Holloway could arrest Mr. Elder at his place of work, Mr. Elder and his brother William

Elder, who also worked at the same place, got word of the officer's intent, and left work early. Lt. Holloway and other officers, after finding out that the Elders had left work, proceeded to William Elder's residence, which was where Charles Elder was also residing at the time. The officers, once they arrived in the area, set up surveillance of the residence. They observed the Elder brothers loading what appeared to be camping equipment into a pickup. William Elder then was seen riding away from the home on horseback. The officers detained William, and confirmed with William that his brother was still in the house. William also told the officers that his brother had access to several firearms in the home. The officers then attempted to make telephone contact with Charles, but were unsuccessful until William used the police loudspeaker to convince Charles to answer the phone. By this time, other officers had arrived near the area and had blocked off the roads coming into the neighborhood. During the telephone conversation between Charles and William, the officers were advised that Charles had fallen inside the house after he suffered an epileptic seizure. During this conversation, Plaintiff Elder suffered another seizure. After he had recovered from this second seizure, Lt. Holloway began speaking on the phone with Charles. Lt. Holloway advised Charles that if he could not walk out of the house, then he should crawl out. After a few minutes, Charles did walk out of the residence.

However, upon exiting the house, he took one step, turned slightly, and fell face down, hitting his head on the concrete walk which caused severe injuries. Emergency medical technicians were then called, and they arrived, treated Mr. Elder and transported him to the hospital.

Plaintiffs, Mr. Elder and his alleged common law wife, filed this suit on September 30, 1988. Three of the counts in the complaint pertain to alleged violations of 42 U.S.C. § 1983, and two counts deal with common law tort claims. Plaintiffs claim that the arrest was a violation of Mr. Elder's constitutional rights which require that the defendants have a valid Idaho arrest warrant before seizing him in his home.

On June 1, 1989, the plaintiffs moved for partial summary judgment on Count One as against Lt. Holloway on the issue of liability. On July 6, 1989, the defendants filed their memorandum in opposition to this motion. The defendants, on August 30, 1990, filed their Motion for Summary Judgment. On October 19, 1990, the plaintiffs filed their memorandum in opposition to this motion, and on October 29, 1990, the defendants filed their reply brief.

On November 6, 1990, this court held a hearing on all pending motions to address the cross-motions for summary judgment. Having thoroughly reviewed the statements of counsel, along with the memoranda, affidavits, and exhibits in the record,

and based upon the analysis to follow, the court has determined that defendants' Motion for Summary Judgment should be granted.

II. ANALYSIS

A. Summary of Cross-Motions

1. Plaintiffs' Motion for Partial Summary Judgment.

In this motion, plaintiffs seek summary judgment against Defendant Holloway on Count One as to his liability only. Count One is a claim against Lt. Holloway and his subordinates for the unreasonable seizure of Mr. Elder, which in turn resulted in Mr. Elder sustaining severe brain damage by his fall. Plaintiffs argue that without a valid Idaho arrest warrant, the defendants could not arrest Mr. Elder in his brother's home, unless there were exigent circumstances for a warrantless arrest. This is clearly the law, and the defendants do not dispute this. State v. Bradley, 106 Idaho 358, 679 P.2d 635 (1984) (where the court held that the officers cannot make a warrantless nonconsentual entry in the home of the suspect to arrest him, without exigent circumstances); Payton v. New York, 445 U.S. 573 (1980).

Plaintiffs argue that for all practical purposes, the arrest occurred in the home because Mr. Elder was restrained in the home, once the defendants "constructively crossed" the threshold of the home by surrounding the home and requesting by police loudspeaker and telephone that Mr. Elder come out. Memorandum in Support of Motion for Partial Summary Judgment, filed June 1, 1989, at 5-6. In support of this argument, the

plaintiffs point to the following "undisputed facts": (1) several armed officers surrounded the house; (2) roadblocks were established in the area of the residence; (3) plaintiff's brother William was detained and prevented from returning to his home; (4) Lt. Holloway did intend to arrest Charles Elder; and (5) a police loudspeaker and telephone were utilized to communicate with Mr. Elder that he should surrender. *Id.* at 7.

2. Defendant's Motion for Summary Judgment.

Initially, the defendant sets forth the prima facia case for establishing a 42 U.S.C. § 1983 claim. Simply stated, the plaintiffs must prove: (1) that the conduct complained of was committed by a person under the color of state law, and (2) that the conduct deprived the plaintiff of a constitutional right. Rinker v. County of Napa, 831 F.2d 829, 831 (9th Cir. 1987). There is no dispute as to the first element. However, the defendants argue that none of plaintiff's constitutional rights were violated.

Defendants' arguments can be summarized as follows.

(a) The arrest conducted outside the home was valid even without a valid Idaho arrest warrant. The defendants note that the plaintiffs argue that even though Idaho statutory law[1] can be interpreted as allowing an arrest without a warrant, the case law clearly requires that the officers have a valid Idaho arrest warrant to arrest an individual in his home. The defendants do not clearly dispute this; they simply attempt to distinguish Bradley and Payton, and argue that the arrest was made outside the home. Memorandum in Support of Motion for Summary Judgment, filed August 30, 1990, at 8-10.

(b) If the court finds that this was a constructive entry, then the arrest was still valid because there existed probable cause (based on the information received and the existence of the Florida warrants) and Mr. Elder was in plain view. *Id.* at 10-11. However, the court finds that this argument clearly does not take into consideration the courts' findings in Bradley, Payton, and United States v. Santana, 427 U.S. 38 (1976).

(c) Exigent circumstances existed that would excuse the arrest warrant requirement. Citing a variety of authorities, defendants set forth several factors which justify a finding of exigent circumstances in this case: (1) suspect believed to be wanted for crime of violence, (Elder was wanted for aggravated battery) United States v. Salvador, 740 F.2d 752 (9th Cir. 1984); (2) suspect believed to be armed (several individuals informed the officers that Elder possessed and had access to guns, and in addition, sources had stated that Elder told them that he would

[1] Idaho Code § 19-4514 (1987) provides in part: "The arrest of a person may be lawfully made . . . without a warrant upon reasonable information that the accused stands charged with a felony by the courts of another state . . . ."

not be arrested and would shoot it out with police) *id.*; (3) there was a clear showing of probable cause (the magistrate's signature on Florida warrants) United States v. Davis, 785 F.2d 610 (8th Cir. 1986); (4) suspect believed to be in the premises (officers saw Elder enter the house) People v. Abney, 407 N.E.2d 543 (1980); (5) likelihood of flight (brothers packing camper) United States v. Williams, 612 F.2d 735 (3d Cir. 1979); and (6) entry can be peaceable and during daylight hours (officers gave Elder an opportunity to surrender, the only possible entry was telephone contact with Elder, and these events occurred during the day) United States v. Davis, 785 F.2d 610 (8th Cir. 1986). Based on these factors, the defendants argue that a constructive entry was necessary in order to prevent the potential harming of others inside or outside the premises which was located in a residential area. Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment, filed July 6, 1989, at 18-23; Memorandum in Support of Motion for Summary Judgment, filed August 30, 1990, at 11-12.

(d) If the court finds that no exigent circumstances existed, then the defendants are still protected by qualified good faith immunity doctrine. The defendants note that this is an affirmative defense that must be proved by them; however, they note that courts have granted summary judgment on this issue if the pleadings and affidavits indicate that there are no genuine issues of material fact. *Id.* at 12 (*citing* Harris v. City of

Roseburg, 664 F.2d 1121, 1129 (9th Cir. 1981), and Kipps v. Ewell, 538 F.2d 564, 566 (4th Cir. 1976)).

According to the defendants, the test for whether or not they are entitled to qualified immunity under the facts is, "[s]hould a reasonable person in the shoes of the individual police officer have known that he was violating another's . . . clearly established constitutional rights?" Memorandum in Support of Motion for Summary Judgment, filed August 30, 1990, at 14 (*citing* Ngiraingas v. Sanchez, 858 F.2d 1368, 1374 (9th Cir. 1988), *aff'd* ___U.S. ___, 110 S.Ct. 1737 (1990)). Applying this standard, the defendants claim that Lt. Holloway knew he could not enter the home without a warrant; however, he in good faith believed he could serve the warrants outside the home in public without a valid Idaho warrant. Defendants argue that the law is unclear in Idaho, as to whether there can be a "constructive entry," and therefore, defendants' conduct did not violate clearly established statutory or constitutional law. Memorandum in Support of Motion for Summary Judgment, filed August 30, 1990, at 12-14.

(e) There is no affirmative link between the alleged violations and the adoption of a policy authorizing the alleged misconduct; therefore, the claims against Ada County and the Sheriff should be dismissed. Under the law, a municipality

cannot be held liable on a respondeat superior theory unless there exists an affirmative link between the violations complained of and the adoption of any plan or policy of the agencies or persons showing authorization or approval of the misconduct. Monell v. Department of Social Serv. of New York, 436 U.S. 658, 691 (1978); Rizzo v. Goode, 423 U.S. 362, 370 (1976). The defendants also cited a Sixth Circuit case which, in addressing this standard, stated:

> The result of Rizzo, and subsequent cases in the lower federal courts applying the standards it announced is that a failure of a supervisory official to supervise, control, or train the offending individual officers is not actionable absent a showing that the official either encouraged the specific incident of misconduct or in some other way directly participated in it. At a minimum a plaintiff must show that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers.

Hays v. Jefferson County, Kentucky, 668 F.2d 869, 874 (6th Cir.), *cert. denied*, 459 U.S. 833 (1982).

Applying this standard, the defendants argue that there is no evidence that Sheriff Killeen's or Ada County's failure to supervise or train their officers caused any injury to the plaintiffs. There is no evidence in the record to indicate that these officials in any manner authorized, approved or knowingly acquiesced in the alleged unconstitutional conduct of the

officers making the arrest.[3] Memorandum in Support of Motion for Summary Judgment, filed August 30, 1990, at 17-18.

In addition, the defendants in oral arguments cited the court to Pembaur v. Cincinnati, 475 U.S. 469 (1986), a United States Supreme Court decision where the court further clarified the defendants' position that Ada County and the Sheriff cannot be found liable under Section 1983 because they did not make a deliberate choice to make public arrests in the manner executed by Lt. Holloway in this case. In Pembaur, the Court stated:

> We hold that municipal liability under § 1983 attaches where--and only where--a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.

Id. at 483-84.

---

[3] It should be noted that according to Lt. Holloway's deposition, the Sheriff, although present at the scene, did not give any orders or take part in the arrest.

> "Q All right. Now, was the sheriff himself involved---I'm talking Vaughn Killeen---in this incident?
>
> "A [Lt. Holloway] He was at this incident.
>
> "Q Okay. What was his role?
>
> "A He didn't do anything, other than he was there, observed what was happening, and obviously was my supervisor. But as far as giving directions on this situation, he was not involved in it."

Reply Memorandum in Support of Motion for Summary Judgment, filed Oct. 29, 1990, Excerpts of Holloway Deposition at 18.

(f) Count Four of the Complaint falls within Idaho Code § 6-904, and therefore should be dismissed. Idaho Code § 6-904[3] provides for governmental immunity for false arrests. Defendants' claim that the plaintiffs in Count Four are seeking damages against Ada County and the Sheriff for injuries they sustained as a result of a false arrest, and that pursuant to Section 6-904, these parties are not liable for these claims. They also assert that the plaintiffs cannot seek redress for both a Section 1983 claim and a common law tort claim, because these claims both seek the same relief. Memorandum in Support of Motion for Summary Judgment, filed August 30, 1990, at 18-19.

(g) The consortium loss claim, Count Five, should also be dismissed as it is wholly derivative of the other claims. Defendants argue that if the other counts are dismissed, then this count fails as a matter of law as a consortium claim is a derivative claim. Runcorn v. Shearer Lumber Prod., Inc., 107 Idaho 389, 394, 690 P.2d 324, 329 (1984). Defendants also assert

---

[3]Idaho Code § 6-904 (1990) provides in part that:

> A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which:
>
> . . . .
>
> 3. Arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation . . . . (emphasis added)

that the claim should fail because the plaintiffs were not married at the time Mr. Elder was injured. They were divorced in 1974 and lived with each other off and on through February of 1987. They reject plaintiffs' argument that they had a valid common law marriage, and argue that Florida law does not recognize common law marriages after 1967. Memorandum in Support of Motion for Summary Judgment, filed August 30, 1990, at 19-20.

In their reply brief, defendants assert that Michigan law also does not recognize common law marriages after 1957, so that Idaho would be the only law that the plaintiffs could make this claim under. They argue that a close reading of Beverly Elder's deposition will indicate that no common law marriage existed in Idaho. They claim that in the deposition, Ms. Elder indicates that when they lived in Idaho, they did not live together, nor did they consider themselves married.

B. Analysis of Pending Motions.

1. The validity of the arrest.

The threshold question that this court must address as it considers these cross-motions for summary judgment is, whether or not it is clearly established in Idaho law that an officer, under the circumstances of this case--where officers surrounded the house, requested the individual to exit the house and that individual complies--must have a valid Idaho arrest warrant in order to arrest that individual. This court finds that there is no clearly established statutory or case law in Idaho or the

Ninth Circuit which addresses this issue. It is not disputed among the parties that if the arrest would have actually occurred in the home, then the officers would have had to have a valid Idaho arrest warrant, and possibly a valid Idaho search warrant[4].

The Idaho Supreme Court in State v. Bradley, 106 Idaho 358, 670 P.2d 635 (1983), following the law announced by the United States Supreme Court in Payton v. New York, 445 U.S. 573, 577 (1980), found that absent exigent circumstances or consent, officers must have a valid Idaho arrest warrant to enter a defendant's private residence in order to make an arrest, even if the officers have a valid arrest warrant from a sister state. The law in this area, where this is an actual entry into the home, is, therefore, clearly established.

Unfortunately, that is where the clarity ends. The court has found no Idaho or Ninth Circuit law which addresses the issue of whether a valid Idaho arrest warrant is necessary in order to make a "constructive entry" into the home to make an arrest. The court was also unsuccessful in finding any law in Idaho or the Ninth Circuit that addresses the issue of what constitutes a "constructive entry" or "constructive crossing of the threshold."

---

[4] The search warrant may have been required in that the home that Charles Elder was residing in at the time, the home at which the arrest was made, was the home of his brother, William Elder. The court notes that this issue was not addressed by the parties, and therefore, this court will not review this issue.

The plaintiffs cite the court to two cases, State v. Holeman, 103 Wash.2d 426, 693 P.2d 89 (1985), and Scroggins v. State, 276 Ark. 177, 633 S.W.2d 33 (1982), which they claim are persuasive in this area. However, neither of these cases are directly on point, and neither case is from this state or this circuit. In Holeman, the officers who executed the arrest reached through the doorway and physically grabbed the individual who was standing in the doorway. The court there held that this was clearly a crossing of the threshold which required an arrest warrant.

In Scroggins, the court dealt with the situation in which the officers knocked on the door of the suspects' motel room and when the suspects answered, they pulled their guns and ordered the suspects out of the house. Once the suspects exited the motel, the officers effectuated the arrest. The court does not find Holeman and Scroggins persuasive as they both are clearly distinguishable from the case at bar. In the case at bar, the officers did not physically cross the threshold to grab Mr. Elder by the arm and pull him out of the house, nor did the officers knock on the door, wait for Mr. Elder to answer, and then pull their guns on him and demand that he come out of the house.

The case law in this area clearly supports the view that the significant point of analysis is the threshold, and that if the person is outside his doorway, in an area with public

access, then he no longer has the protection of requiring a warrant. State v. Bradley, 106 Idaho 358, 679 P.2d 635 (1984); United States v. Karagozian, 715 F.Supp. 1160 (D.Conn. 1989) (where the court held that a secluded rear deck of a home still has the same privacy expectations as the home because this is not a place, like the driveway, with ready access to visitors, nor was it visible to the public). Based on this analysis, the court finds that once Mr. Elder stepped out of the front door of his brother's house, onto the public access sidewalk of the home, a public arrest was made unless he can show that he did not exit the house voluntarily, or unless he can show that the area where he was arrested was secluded from public access and deserving of the same expectation of privacy as the home itself. These questions clearly present genuine issues of material facts that prevent this court from entering summary judgment on this issue.

The Eighth Circuit, in Duncan v. Storie, 869 F.2d 1100 (8th Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 85 (1989), addressed a similar question concerning similar facts. In Duncan, the plaintiff brought a Section 1983 claim, alleging unlawful arrest and excessive use of force. The main question in the case was whether a public arrest occurred in the doorway of the plaintiff's house. Because the court found that there existed genuine issues of material fact concerning whether or not a public arrest was made, the court refused to grant summary

judgment. The court summed up the law in this area very clearly when it stated:

> Depending upon whether Duncan was arrested in his home or outside in a public place, different standards apply . . . . If an individual voluntarily left the confines of his home, as Storie and Whitted claim that Duncan did, then the arrest was made in a public place. United States v. Santana, 427 U.S. 38, 42, 96 S.Ct. 2406, 2409, 49 L.Ed.2d 300 (1976). Under these circumstances, the individual has no expectations of privacy and the arresting officers need only demonstrate that there was probable cause in order to justify a warrantless arrest. . . . However, a warrantless arrest that occurs inside an individual's home is unconstitutional unless the officers demonstrate the existence of probable cause and exigent circumstances.
>
> The doorway of an individual's home or apartment or hotel room may be a public place for the purpose of making a warrantless arrest *if the individual has come to stand in the doorway voluntarily*. *See* United States v. Whitten, 706 F.2d 1000, 1015 (9th Cir. 1983). However, an individual who is *compelled* to stand in a doorway cannot be lawfully arrested without the existence of probable cause and exigent circumstances.

Duncan v. Storie, 869 F.2d at 1102 (citations and footnote omitted) (emphasis added).

The Duncan court emphasized that the focus should not be on the exact location of the individual in relation to the doorway, but instead, the crucial issues are whether the individual had an expectation of privacy, and whether the individual came to the door voluntarily. *Id.* Applying this law, the court, in denying defendant's motion for summary judgment, found that it could not hold as a matter of law, that the individual "voluntarily placed himself in a public place and

willingly relinquished the expectation of privacy that he is entitled to when he is within his home." *Id.* at 1103.

Applying this analysis to the facts in this case provides the court with ample grounds to deny plaintiffs' Motion for Partial Summary Judgment, and defendants' Motion for Summary Judgment on the issue of whether the arrest was valid. The court finds that there still are genuine issues of material fact concerning whether Mr. Elder placed himself voluntarily in a public place, and whether he willingly relinquished his expectation of privacy. As noted above, the defendants argue that they did not coerce Mr. Elder out of the home, but instead, that Mr. Elder's brother was the one who talked to Mr. Elder on the phone and police loudspeaker. They further assert that if Mr. Elder would not have come out into the public place voluntarily, *then* they would have obtained an Idaho search and arrest warrant. The court finds that there is ample evidence to support a finding that there still exists genuine issues of material fact on this issue.

2. Exigent circumstances.

If this court were to hold that there was a "constructive entry" into the home, and therefore, the defendants had to obtain a valid Idaho arrest warrant, the defendants argue that the warrant requirement would be excused because of the existence of exigent circumstances. As noted above, the defendants cite several factors that Lt. Holloway testified to in his deposition

that constitute exigent circumstances. Despite conceding that Mr. Elder was wanted for felony charges in Florida, and that he said he would not be arrested, and that he had access to guns in the house, plaintiffs argue that these factors alone or together do not constitute exigent circumstances. Plaintiffs' Response to Defendants' Memorandum in Support of Motion for Summary Judgment, filed Oct. 19, 1990, at 5-6.

Plaintiffs argue that under Michigan v. Tyler, 436 U.S. 499, 509 (1978), the unifying question under the case law for determining whether exigent circumstances exist, is whether or not "there is compelling need for official action and no time to secure a warrant." Plaintiffs assert that the warrantless entry should be upheld only if there was "a 'compelling need' to avoid an imminent risk of danger to life or property, destruction or loss of evidence, or escape of the suspect." Plaintiffs' Response to Defendant's Memorandum in Support of Motion for Summary Judgment, filed on Oct. 19, 1990, at 6-7 (citation omitted).

The plaintiffs assert that the facts indicate that this was not an exigent circumstance because the police had planned the arrest five days before the incident, and that the police themselves created the exigency by surrounding the home and ordering Mr. Elder out of the house. They argue that there was not a compelling need to suspend the warrant requirement because there was not any risk of danger to anyone, there was no risk of

evidence being destroyed, and there was no risk of flight. *Id.* at 7-10. These assertions alone clearly create genuine issues of material facts. This court, therefore, finds that whether or not, under these circumstances, exigent circumstances existed to excuse the requirement that officers have a valid Idaho arrest warrant is a question of fact, which prevents this court from entering summary judgment in favor of the defendants on this issue.

3. Qualified immunity.

This court's analysis on whether or not there was a valid arrest under the circumstances in this case controls the outcome on the issue of qualified immunity. Plaintiffs, under their Section 1983 claims, argue that they are entitled to recover against the defendants because the defendants violated clearly established constitutional rights, specifically, Mr. Elder's right not to be arrested in his brother's home without a valid Idaho arrest warrant. Defendants assert that even if the court were to find that a valid Idaho arrest warrant was required to make an arrest, and even if the court found that there were no exigent circumstances to justify the warrantless arrest, the court must still find in favor of the defendants because they are protected by the doctrine of qualified good faith immunity. The court is persuaded by defendants' argument.

In Malley v. Briggs, 475 U.S. 335 (1986), the Supreme Court, in further defining the qualified immunity standard set

forth in Harlow v. Fitzgerald, 457 U.S. 800 (1982), stated: "Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." Malley v. Briggs, 475 U.S. at 341. *See also*, Los Angeles Police Protective League v. Gates, 907 F.2d 879, 887-88 (9th Cir. 1990).

In terms of this case, the defendants restate this standard as "whether no reasonable officer could have believed that an Idaho warrant was not required for an arrest upon Bill Elder's front porch." Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment, filed July 6, 1989, at 15. In Ngiraingas v. Sanchez, 858 F.2d at 1374, the Ninth Circuit, in adopting the Third Circuit's standard, stated that:

> Deciding whether a police officer has acted in good faith is no easy task. As a general matter, however, we note that good faith immunity is judged "by an objective standard, not by examination of the subjective state of mind of the officer." . . . *The relevant question is . . . "[W]ould or should a reasonable person in the shoes of the individual police officer have known that he was violating another's . . . clearly established constitutional rights . . ."*?

Id. (citation omitted) (emphasis added).

As stated above, the law is clearly established that absent consent or exigent circumstances, officers must obtain a valid arrest warrant prior to crossing the threshold of a home to arrest an individual. State v. Bradley, 106 Idaho 358, 670 P.2d

635 (1983); Payton v. New York, 445 U.S. 573, 577 (1980). However, the law is not clear--in fact, the court has found no controlling Idaho or Ninth Circuit case law--on the issue of "constructive crossing of the threshold." The law is uncertain as to what even constitutes a "constructive crossing." These questions appear to be questions of fact, that must be dealt with on a case-by-case basis. There is certainly no statutory or case law that provides that a constructive crossing of the threshold occurs when the officers surround the house, and then attempt to make contact with the individual in the home.

Therefore, the defendants in this case could not have been violating plaintiff's clearly established rights when the law was far from certain as to when a constructive entry occurs, and there exists no official policy relating to getting a suspect out of his home by telephone or police loudspeaker. There is no way that any individual officer, under the circumstances of this case, could have known that he was violating another's clearly established constitutional rights when those rights were not yet clearly established. Until the law is better defined, it appears to this court that officers in similar circumstances could make an arrest outside the home if they in good faith believed that they could effectuate the arrest without violating any clearly established constitutional rights. The officers in this case clearly acted reasonably under the circumstances as it was their understanding of the law, and it was provided for in Ada County's

arrest and custody policy[3], that as long as they made the arrest outside the home, they could make the arrest without an Idaho arrest warrant. It appears from the record that the officers reasonably believed that their actions were constitutional; therefore, no liability attaches to their actions.

4. Application of summary judgment standard.

In Harris v. City of Roseburg, 664 F.2d 1121 (9th Cir. 1981), the Ninth Circuit, in addressing the doctrine of qualified good faith immunity, has stated that even though this defense is an affirmative defense that must be proved by the police officers, summary judgment is still appropriate if the pleadings and affidavits indicate that there are no genuine issues of material fact. In affirming the district court's granting of summary judgment in favor of the police officers, the court stated:

> "The non-movant has an affirmative duty to come forward to meet a properly supported motion for summary judgment . . . ." [W]e find that the affidavits and depositions set forth facts, which, if accepted, would entitle Bergman [the officer] to summary judgment. With respect

---

[3] *See* Exhibit D attached to Plaintiffs' Response to Defendants' Memorandum in Support of Motion for Summary Judgment, filed October 19, 1990, which is a copy of Ada County's "arrest and custody" policy that was in effect at the time of the arrest.

> to Bergman's good faith defense, plaintiff has not raised any triable issues of fact as to whether Bergman reasonably believed that his actions were proper.

Id. at 1129-30 (citation omitted).

It is well settled that a party in defending against a motion for summary judgment may not simply rest upon the bare pleadings.[6] As the Ninth Circuit stated in United States v. Allen, 578 F.2d 236 (9th Cir. 1978): "In order successfully to oppose a motion for summary judgment, a party may not rely solely on conclusory allegations in the pleadings . . . but must, instead, offer some evidence at least outlining a factual dispute." *Id.* at 237 (citations omitted).

Moreover, under Rule 56, it is clear that an issue in order to preclude entry of summary judgment must be *both* "material" and "genuine." An issue is "material" if it affects the outcome of the litigation. An issue, before it may be considered "genuine," must be established by "sufficient evidence

---

[6] *See also* Fed. R. Civ. P. 56(e), which provides in part:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is an genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party."

U.S.C.S. Rules of Civil Procedure, Rule 56(e) (Law. Co-op. 1987 & Supp. 1990).

supporting the claimed factual dispute . . . to require a jury or judge to resolve the parties' differing versions of the truth at trial." Hahn v. Sargent, 523 F.2d 461, 464 (1st Cir. 1975) (*quoting* First Nat'l Bank of Arizona v. Cities Serv. Co., Inc., 391 U.S. 253, 289 (1968)). The Ninth Circuit cases are in accord. *See e.g.*, British Motor Car Distrib., Ltd. v. San Francisco Automotive Indus. Welfare Fund, 882 F.2d 371 (9th Cir. 1989).

According to the Ninth Circuit, in order to withstand a motion for summary judgment, a party

> (1) must make a showing sufficient to establish a genuine issue of fact with respect to any element for which it bears the burden of proof; (2) must show that there is an issue that may reasonably be resolved in favor of either party; and (3) must come forward with more persuasive evidence than would otherwise be necessary when the factual context makes the non-moving party's claim implausible.

Id. at 374 (citation omitted).

The court finds that on the issue of whether the officers acted in good faith when they arrested Mr. Elder without a warrant outside his brother's home, the plaintiffs have failed to raise any triable issues of fact as to whether Lt. Holloway believed that his actions were proper.

C. Conclusion

Based on the foregoing analysis, the applicable standards under Rule 56, and the direction given by the Ninth Circuit in considering these issues, the court finds under the doctrine of qualified good-faith immunity, the defendants are entitled to

summary judgment. Because all the other claims asserted by the plaintiffs are derivative of the claims against the officers--that is, without a finding that the officers had violated plaintiffs' rights, the plaintiffs could not prevail on their other claims--the court finds that Ada County and Sheriff Vaughn Killeen are also entitled to summary judgment. The plaintiffs have failed to offer any evidence of an official policy of Ada County or the Sheriff's Department, which would make them liable under Section 1983. Plaintiffs' claim for loss of consortium must also fail as a matter of law, as this claim is wholly contingent upon plaintiffs' success on the underlying tort claims. Runcorn v. Shearer Lumber Prod., Inc., 107 Idaho 389, 394, 690 P.2d 324, 329 (1984).

III. ORDER

Based on the foregoing and the court being fully advised in the premises,

IT IS HEREBY ORDERED that plaintiffs' Motion for Partial Summary Judgment, should be and hereby is, DENIED in its entirety.

IT IF FURTHER ORDERED that defendants' Motion for Summary Judgment, should be and hereby is, GRANTED.

DATED this 20 day of November, 1990.

HAROLD L. RYAN
UNITED STATES DISTRICT JUDGE

JAMES J. DAVIS
ATTORNEY AT LAW
P.O. BOX 8126
960 BROADWAY, SUITE 302
BOISE, IDAHO 83707

TELEPHONE (208) 336-3244

FACSIMILE (208) 336-3374

May 28, 1993

RECEIVED
JUN - 3 1993
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Clerk of the Court
Supreme Court of the United States
1 First Street, NE
Washington, D.C. 20543

Re: Case No. 92-8579
Elder v. R. D. Holloway, et al

Dear Clerk of the Court:

Enclosed are original and twelve copies of Respondents' Brief in Opposition to a Petition for a Writ of Certiorari and an original and one copy of a Proof of Service for filing with the Court in the above referenced matter. I have also enclosed an extra copy of the Brief and Proof of Service. Please conform the same with the Court's filing information and return them to me in the envelope provided.

Thank you for your assistance.

Sincerely,

James J. Davis

JJD/db

Enclosures

No. 92-8579

In The

SUPREME COURT OF THE UNITED STATES

April Term, 1993

COPY

CHARLES K. ELDER,

Petitioner,

v.

R. D. HOLLOWAY, AND OTHER UNKNOWN EMPLOYEES AND AGENTS, individually, and in their official capacity as police officers for the Ada County Sheriff's Office; VAUGHN KILLEEN as Sheriff of Ada County; and the COUNTY OF ADA,

Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PROOF OF SERVICE

JAMES J. DAVIS
Attorney at Law
960 Broadway, Suite 302
P. O. Box 8126
Boise, Idaho 83707
Telephone: (208) 336-3244

Counsel of Record for Respondents

STATE OF IDAHO)
) ss:
County of Ada)

JAMES J. DAVIS, being first duly sworn, deposes and says that pursuant to Rule 29.5 of this Court, he served the within BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI on counsel for Petitioner by enclosing a copy thereof in an envelope, first class postage prepaid, addressed to:

John C. Lynn
Lynn, Scott, Hackney & Sullivan
1015 West Hays
Boise, Idaho 83702

and depositing the same in the United States mail at Boise, Idaho on May 28, 1993.

JAMES J. DAVIS

SUBSCRIBED AND SWORN To before me this 28th day of May, 1993.

Notary Public for Idaho
Residing at: Boise
Commission Expires: 1/25/94

STATE OF IDAHO)
) ss:
County of Ada)

JAMES J. DAVIS, being first duly sworn, deposes and says that pursuant to Rule 29.5 of this Court, he served the within BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI on counsel for Petitioner by enclosing a copy thereof in an envelope, first class postage prepaid, addressed to:

John C. Lynn
Lynn, Scott, Hackney & Sullivan
1015 West Hays
Boise, Idaho 83702

and depositing the same in the United States mail at Boise, Idaho on May 28, 1993.

JAMES J. DAVIS

SUBSCRIBED AND SWORN To before me this 28th day of May, 1993.

Notary Public for Idaho
Residing at: Boise
Commission Expires: 1/25/94

No. 92-8579

In The

SUPREME COURT OF THE UNITED STATES

April Term, 1993

CHARLES K. ELDER,

Petitioner,

v.

R. D. HOLLOWAY, AND OTHER UNKNOWN EMPLOYEES AND AGENTS, individually, and in their official capacity as police officers for the Ada County Sheriff's Office; VAUGHN KILLEEN as Sheriff of Ada County; and the COUNTY OF ADA,

Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PROOF OF SERVICE

JAMES J. DAVIS
Attorney at Law
960 Broadway, Suite 302
P. O. Box 8126
Boise, Idaho 83707
Telephone: (208) 336-3244

Counsel of Record for Respondents

ORIGINAL

Supreme Court, U.S.
FILED
MAY 28 1993
OFFICE OF THE CLERK

No. 92-8579

In The

SUPREME COURT OF THE UNITED STATES

April Term, 1993

CHARLES K. ELDER,

Petitioner,

v.

R. D. HOLLOWAY, AND OTHER UNKNOWN EMPLOYEES AND AGENTS, individually, and in their official capacity as police officers for the Ada County Sheriff's Office; VAUGHN KILLEEN as Sheriff of Ada County; and the COUNTY OF ADA,

Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

JAMES J. DAVIS
Attorney at Law
960 Broadway, Suite 302
P. O. Box 8126
Boise, Idaho 83707
Telephone: (208) 336-3244

Counsel of Record for Respondents

QUESTIONS PRESENTED FOR REVIEW

1. When the affirmative defense of qualified immunity is raised by a defendant in a civil rights action, who has the burden of proving whether the law is clearly established?

2. If the burden of proof is on the plaintiff, and the plaintiff fails to provide applicable case law which shows the law was clearly established, should summary judgment be granted to defendant?

3. Whether the Petition for a Writ of Certiorari should be granted when, regardless of how the burden of proof issues are resolved, defendant is entitled to qualified immunity because the law was not clearly established.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

STATEMENT OF THE CASE 1

A. STATEMENT OF FACTS 1

B. PROCEEDINGS AND DISPOSITION IN LOWER COURTS 3

SUMMARY OF ARGUMENT 5

ARGUMENT 5

I. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE NINTH CIRCUIT'S AMENDED OPINION DOES NOT, CONTRARY TO ELDER'S ARGUMENTS, CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT 5

II. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE HOLLOWAY IS ENTITLED TO QUALIFIED IMMUNITY SINCE THE LAW WAS NOT CLEARLY ESTABLISHED WHETHER A LAW ENFORCEMENT OFFICER COULD CONDUCT SURVEILLANCE OF A PERSONAL RESIDENCE WITH THE INTENT OF ARRESTING THE SUSPECTED FELON ONCE HE LEFT THE RESIDENCE 13

CONCLUSION 18

TABLE OF AUTHORITIES

Abel v. Miller,
824 F.2d 1522 (7th Cir. 1987) 12

Anderson v. Creighton,
483 U.S. 635, 640 (1987) 6, 15

Cooper v. Sheriff, Lubbock County Texas,
929 F.2d 1078 (5th Cir. 1991) 12

Courson v. McMillian,
939 F.2d 1479 (11th Cir. 1991) 12

Davis v. Scherer,
468 U.S. 183, 197 (1984) 6, 12

Duncan v. Storie,
869 F.2d 1100 (8th Cir.),
cert. denied, 493 U.S. 852 (1989) 8

Harlow v. Fitzgerald,
457 U.S. 800, 818 (1982) 6

Hilliard v. City and County of Denver,
930 F.2d 1516 (10th Cir. 1991),
cert. denied 112 S.Ct. 656, 116 L.Ed.2d 748,
____ U.S. ____ (1991) 12

Payton v. New York,
445 U.S. 573 (1980) 7, 13

Pierson v. Ray,
386 U.S. 547 (1967) 6

United States v. Al-Azzawy,
784 F.2d 890 (9th Cir. 1986) . . . 10, 11, 13, 15, 16, 17, 18

United States v. Botero,
589 F.2d 430 (9th Cir. 1979),
cert. denied, 441 U.S. 944 (1979) 14, 15

United States v. George,
883 F.2d 1407, 1415 (9th Cir. 1989) 15

United States v. Santana,
427 U.S. 38 (1976) 14, 15

United States v. Watson,
423 U.S. 411 (1976) 7, 13

Wegener v. City of Covington,
933 F.2d 390 (6th Cir. 1991) 12

42 U.S.C. § 1983 6

STATEMENT OF THE CASE

A.

STATEMENT OF FACTS

Petitioner, Charles K. Elder ("Elder")[1], was charged in the State of Florida with two felonies: aggravated battery and dealing in stolen property. On April 22, 1987, when he failed to appear for his arraignments, warrants were issued for his arrest.

Two days later, Respondent, R. D. Holloway ("Holloway")[2], a Lieutenant in the Ada County Sheriff's Department, following up on information provided by a Boise City Police Officer, contacted an informant who said Elder was in Boise, Idaho. The informant told Holloway that Elder had purchased a gun; Elder was very anti-police; Elder had nearly killed two people in Florida by beating them with a pool cue; and ". . . he was going to shoot it out with law enforcement if anyone attempted to arrest him . . ." on the Florida warrants. The Boise City Officer who initially spoke with the informant classified Elder as armed and "extremely dangerous."

---

[1] The Petition for a Writ of Certiorari identifies Elder as the sole Petitioner. Elder's alleged common law wife was a party plaintiff in this action and has remained a party through the appeal. Apparently, she does not join in this appeal. Her right to join in the Petition for a Writ of Certiorari is barred. Supreme Court Rule 12.2. It may be that to qualify for in forma pauperis status under Supreme Court Rule 39.1 the alleged common law wife's claim has been abandoned.

[2] The Petition for a Writ of Certiorari identifies Holloway and "Other Unknown Employees And/Or Agents" as Respondents. Elder's Complaint also named as Defendants the Ada County Sheriff Vaughn Killeen and the County of Ada. Elder's purpose in not including them in the caption as Respondents is not clear. See n.3. Regardless of who is an appropriate Respondent, for purposes of clarity all Respondents will be referred to as "Holloway."

After obtaining certified copies of the Florida warrants, on April 27, 1987, Holloway and other officers attempted to serve the warrants on Elder at an outdoor location. Holloway learned that Elder was employed by a tree cutting service. Holloway contacted Elder's employer and learned that Elder would be at an outdoor job site on April 27, 1987. Arrangements were made with the employer to arrest Elder there. When the officers arrived at the job site, they learned that Elder's employer had told him that the police were looking for him. Elder had left the job site with his brother William Elder and they had in their possession a .44 caliber handgun.

Upon learning that Elder had left the job site, Holloway and the other deputies drove to the area where Elder was residing with his brother William. They parked some distance away and were waiting for Elder to leave the residence so they could arrest him. Holloway did not intend to arrest Elder in the residence. He hoped to survey the residence, spot Elder leaving, and then arrest him. During this time the two Elder brothers were observed loading camping equipment into a pickup truck, and it appeared the two brothers had exchanged clothing with each other a number of times. A short time later William Elder rode a horse away from the house, at which point the Ada County Sheriff's Deputies stopped him to find out the status of his brother. William Elder did indicate that his brother was in the house along with a number of firearms. He also said his brother would resist arrest.

At this point the officers tried calling Elder on the telephone but he would not answer. Then William Elder was asked to

contact his brother by use of a loudspeaker. He told his brother to answer the phone. Thereafter, William Elder telephoned Elder and spoke with him. During this conversation William Elder told his brother that there were cops in the area and "You can't shoot it out with them. You can't win." Holloway also learned at that time that Elder was claiming he had fallen in the crawl space area of the house and hit his head. Holloway was also made aware that Elder was prone to epileptic seizures.

During the telephone conversation between William Elder and Elder, it appeared that Elder may have passed out. Holloway took the phone, whereupon Elder indicated he had fallen, hit his head, was dizzy and did not know if he could walk out of the house. Holloway told Elder he should crawl out the door and onto the grass.

When Elder came out the door, he was walking, not crawling as instructed. He stepped on the front concrete stoop, had a seizure, turned slightly, and then fell, hitting his head on the concrete. Elder was transported to a local hospital by paramedics. Elder has been left partially paralyzed as a result of the fall on the front stoop.

B.

PROCEEDINGS AND DISPOSITION IN LOWER COURTS

Elder's Complaint sought damages under myriad theories alleging violation of federal civil rights and commission of state law torts. The gist of the Complaint, however, was that Elder had been arrested in his residence without an Idaho warrant and with no exigent circumstances justifying the arrest. Cross-Motions for

Summary Judgment were filed. Elder's summary judgment asked the court to find as a matter of law that his arrest was unconstitutional because, although he was not arrested inside, he was "constructively" arrested when he became aware of the officers' presence outside. Holloway's Motion for Summary Judgment[3] requested a ruling that he had qualified immunity for the arrest since the law was not clearly established whether a warrant was required where the officers intended to arrest the person outside; conducted surveillance to locate the suspect at an outside location; and contacted Elder in the residence only after being discovered. The District Court granted Holloway's Motion for Summary Judgment. The only issue Elder appealed to the Ninth Circuit was the qualified immunity issue. The Ninth Circuit affirmed in an Opinion dated December 19, 1991. It then reaffirmed

[3] As stated in n.2, Elder's Complaint named as Defendants Ada County, Idaho and the Ada County Sheriff's Department. All of the Defendants moved for summary judgment on several grounds. In addition to granting summary judgment to Holloway on the qualified immunity issue, the district court: (1) Denied Cross-Motions as to the validity of the arrest on the basis that genuine issues of material fact existed. (2) Denied Holloway's Motion that exigent circumstances justified the arrest on the basis that there were genuine issues of material fact. (3) Granted Ada County, Idaho's and the Ada County Sheriff's Motion on the basis that Elder had failed to offer any evidence of an official policy. (4) Granted summary judgment as to the state law claims.

The summary judgment granted to Ada County, Idaho and the Ada County Sheriff -- based upon Elder's failure to prove the existence of an "official policy" -- was not appealed. That may explain why Ada County, Idaho and the Ada County Sheriff are not identified in the caption of the Petition for a Writ of Certiorari. See n.2. It is inappropriate, then, for Elder to bring this appeal against Holloway in his official capacity (as is shown in the caption) since that claim was resolved adversely to Elder and has not been appealed.

in an Amended Opinion dated September 17, 1992.[4] Elder then filed a Petition for Rehearing With Suggestion for Rehearing En Banc which was denied in an Order dated January 27, 1993.

Elder appeals the Order denying the Petition for Rehearing with Suggestion for Rehearing En Banc. The sole issue presented by Elder's Petition for a Writ of Certiorari is the qualified immunity afforded to Holloway by the District Court.

SUMMARY OF ARGUMENT

The Petition for a Writ of Certiorari should be denied because the Ninth Circuit's Amended Opinion does not, contrary to Elder's arguments, conflict with applicable decisions of this Court. Further, the Petition for a Writ of Certiorari should be denied because Holloway is entitled to qualified immunity since the law was not clearly established whether a law enforcement officer could conduct surveillance of a personal residence with the intent of arresting the suspected felon once he left the residence.

ARGUMENT

I.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE NINTH CIRCUIT'S AMENDED OPINION DOES NOT, CONTRARY TO ELDER'S ARGUMENTS, CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The Amended Opinion is consistent with Supreme Court precedent on qualified immunity. Applicable decisions from this Court establish that a law enforcement officer sued in his

[4] Elder failed to advise this Court of the issuance of the Amended Opinion and failed to provide a copy as an attachment to the Petition for a Writ of Certiorari. A copy is attached hereto as Exhibit A.

individual capacity under 42 U.S.C. § 1983 is entitled to qualified immunity when the conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Pierson v. Ray, 386 U.S. 547 (1967). The inquiry is an objective one to be determined by the judge as a matter of law on a motion for summary judgment. Harlow v. Fitzgerald, supra, at 818-819. The breadth of the inquiry concerning whether the law is clearly established must be particularized such that the contours of the right are sufficiently defined so a reasonable law enforcement officer understands his conduct violates that right. Anderson v. Creighton, 483 U.S. 635, 640 (1987). When a law enforcement officer asserts qualified immunity, the plaintiff must show that the law was clearly established at the time the officer acted. Davis v. Scherer, 468 U.S. 183, 197 (1984).

The Ninth Circuit's Amended Opinion recognizes and follows this Court's precedent on qualified immunity. The Amended Opinion held that plaintiff has the burden of proof of showing that the law was clearly established. When the plaintiff fails to meet that burden the law enforcement officer is entitled to summary judgment on the issue of qualified immunity. The result reached by the Ninth Circuit is not only consistent with this Court's decisions, it is predictable. Davis v. Scherer's holding that plaintiff must "show" the rights were clearly established to overcome the immunity afforded a government actor necessitates that the plaintiff present the court with the appropriate case law.

Elder failed to do so. Holloway is, therefore, entitled to qualified immunity under this Court's decisions.

To better understand the issue presented to this Court the context in which Holloway was granted summary judgment on qualified immunity and why the summary judgment was affirmed by the Ninth Circuit must be reviewed. Holloway did not enter Elder's residence to arrest him. In fact, Holloway attempted to arrest Elder outside his place of employment. Holloway only went to Elder's residence to determine whether Elder was there. Once it was determined that Elder was there, surveillance was conducted with the hope that Elder would leave the residence and could be arrested away from the house. The plan failed when William Elder left the house and became aware of the officer's presence. With William Elder's assistance Elder was contacted and requested to come outside. Elder did so but had an epileptic seizure on the front stoop, fell, and was injured.

Elder and Holloway filed Cross-Motions for Summary Judgment on the issue of whether the arrest was constitutional. The parties did not dispute that a warrant is necessary to arrest someone in a personal residence absent exigent circumstances, Payton v. New York, 445 U.S. 573 (1980), and that a warrant is not necessary to arrest in a public place, United States v. Watson, 423 U.S. 411 (1976). It was Elder's position that his arrest occurred within the residence and that a warrant was, therefore, required. To make that argument, Elder took the position that Holloway had made a "constructive entry" into the residence by

"surrounding" the residence and by contacting Elder by loudspeaker and telephone.

With regard to the constitutionality of the arrest, Holloway took the position that the arrest was constitutional because it occurred outdoors or because it was justified by exigent circumstances. The District Court refused to grant summary judgment to either party on the constitutionality of the arrest since there were genuine issues of material fact which precluded the granting of summary judgment. The District Court reached that conclusion after reviewing, and distinguishing the case law offered by Elder and noting that no Idaho or Ninth Circuit law could be found which addressed Elder's "constructive entry" theory. Relying upon the analysis of an Eighth Circuit case, Duncan v. Storie, 869 F.2d 1100 (8th Cir.), cert. denied, 493 U.S. 852 (1989), which postdated Elder's arrest, the District Court held there were genuine issues of material fact concerning ". . . whether Mr. Elder placed himself voluntarily in a public place, and whether he willingly relinquished his expectation of privacy." Memorandum Opinion and Order, p. 17.

In addition to the Motion for Summary Judgment on the issue of the constitutionality of the arrest, Holloway sought summary judgment on the affirmative defense of qualified immunity. In response, Elder relied upon the same legal authority he had advanced with regard to the constitutionality of the arrest. Elder did not present any Idaho or Ninth Circuit cases on the constructive entry issue. The District Court granted summary judgment on qualified immunity because Elder's proffered case law

was easily distinguished and no other law was offered which supported Elder's constructive entry theory. The District Court analyzed the issue as follows:

> However, the law is not clear -- in fact, the court has found no controlling Idaho or Ninth Circuit case law -- on the issue of "constructive crossing of the threshold." The law is uncertain as to what even constitutes a "constructive crossing." These questions appear to be questions of fact, that must be dealt with on a case-by-case basis. There is certainly no statutory or case law that provides that a constructive crossing of the threshold occurs when the officers surround the house, and then attempt to make contact with the individual in the home.
>
> Therefore, the defendants in this case could not have been violating plaintiff's clearly established right when the law was far from certain as to when a constructive entry occurs, and there exists no official policy relating to getting a suspect out of his home by telephone or police loudspeaker. There is no way that any individual officer, under the circumstances of this case, could have known that he was violating another's clearly established constitutional rights when those rights were not yet clearly established. Until the law is better defined, it appears to this court that officers in similar circumstances could make an arrest outside the home if they in good faith believe that they could effectuate the arrest without violating any clearly established constitutional rights. The officers in this case clearly acted reasonably under the circumstances as it was their understanding of the law, and it was provided for in Ada County's arrest and custody policy, that as long as they made the arrest outside the home, they could make the arrest without an Idaho arrest warrant. It appears from the record that the officers reasonably believed that their actions were constitutional; therefore, no liability attaches to their actions.
>
> Memorandum Opinion and Order, pp. 21-22.

On appeal to the Ninth Circuit, Elder challenged the District Court's analysis of the qualified immunity issue and continued to advance his constructive entry theory. He relied upon the same cases presented to the District Court. At oral argument, the panel asked why a Ninth Circuit case -- United States v. Al-Azzawy, 784 F.2d 890 (9th Cir. 1986) -- was not dispositive of this case.[5] Elder's response was that the case was distinguishable.[6]

With that background, the Ninth Circuit's Amended Opinion can be analyzed. The Amended Opinion begins by adopting the analysis applied by the District Court in granting summary judgment. In so doing, it recognized that the cases presented by Elder in support of his "constructive entry" theory did not clearly establish whether Elder's arrest was constitutional.

The Amended Opinion could not end there, however, because the circuit court on its own initiative became aware of the Al-Azzawy decision. According to the Amended Opinion, Al-Azzawy ". . . might have alerted a reasonable officer to the constitutional implication of putting a suspect under arrest after he had

---

[5] The Al-Azzawy decision will be discussed in the next section of this brief.

[6] Elder's position that Al-Azzawy is distinguishable can be explained. The ultimate holding in Al-Azzawy was that an arrest under circumstances very similar to Elder's was constitutional because of exigent circumstances. If Elder had argued Al-Azzawy applied, Holloway would have been entitled to summary judgment on the issue of the constitutionality of the arrest. Holloway would also have been entitled to summary judgment on the qualified immunity issue because a reasonable officer having knowledge of the similarity between Al-Azzawy and Elder's arrest could have believed that the arrest was constitutional.

come outside his house pursuant to an order to exit." Amended Opinion, pp. 5-6. In light of Al-Azzawy's potential for placing a law enforcement officer "on notice" of clearly established law, the issue defined by the Ninth Circuit was:

> . . . whether a summary judgment on qualified immunity in favor of a law enforcement officer which was properly granted on the record presented to the district court, should nevertheless be reversed because there are legal authorities that plaintiff did not present to the district court or to us on appeal which suggest that, contrary to what the district court found, the law was clearly established at the time of the incident.
>
> Amended Opinion, p. 2.

The Ninth Circuit answered the issue in the negative -- the summary judgment would not be reversed -- because Elder had the burden in the District Court of showing clearly established law, which he failed to do. The Ninth Circuit has long recognized that the plaintiff has the burden of showing clearly established law. See, Amended Opinion, pp. 6-7 and n.2. Elder's failure to present the one case which even arguably supported his position entitled Holloway to summary judgment.

The Ninth Circuit's limited holding is that it was not reversible error by the District Court to fail to supply Plaintiff with the case law to support his case. Amended Opinion, p. 16. That was so, particularly since even when the Ninth Circuit Panel asked Elder about Al-Azzawy's application to the case, he argued it was distinguishable.

> Given our adversary system, we are unwilling to say that Elder should be stuck with our take on a case that his counsel thinks is distinguishable, but rather believe that when

> the plaintiff has the burden of adducing the legal facts necessary to prove that the law was clearly established, the record upon which that determination is made is his call rather than ours.
>
> Amended Opinion, p. 16.

In the final analysis, the holding in the Amended Opinion is that where a plaintiff in a civil rights case is confronted with a qualified immunity defense, he must make a showing that his clearly established rights were violated. When that burden is not met, qualified immunity is granted. That holding is entirely consistent with Davis v. Scherer, supra, and this Court's other qualified immunity cases. It is also consistent with the vast majority of circuit courts of appeal which have considered the issue. Hilliard v. City and County of Denver, 930 F.2d 1516 (10th Cir. 1991), cert. denied 112 S.Ct. 656, 116 L.Ed.2d 748, ____ U.S. ____ (1991); Courson v. McMillian, 939 F.2d 1479 (11th Cir. 1991); Wegener v. City of Covington, 933 F.2d 390 (6th Cir. 1991); Cooper v. Sheriff, Lubbock County Texas, 929 F.2d 1078 (5th Cir. 1991); and Abel v. Miller, 824 F.2d 1522 (7th Cir. 1987).

Elder's argument in his Petition for a Writ of Certiorari that the Amended Opinion is inconsistent with Supreme Court precedent should be viewed carefully. Elder, as already noted, ignores the Amended Opinion. He did not supply the Amended Opinion to this Court and did not compare the Amended Opinion to this Court's precedent. In so doing, Elder improperly defined the issue on appeal and mischaracterized the Ninth Circuit's decision. Elder defined the issue as ". . . whether a party on appeal may rely only on those authorities cited to the District Court." Petition for a

Writ of Certiorari, p. i. He then argues that he was precluded by the Ninth Circuit from relying upon Al-Azzawy because he did not cite it to the District Court. Petition for a Writ of Certiorari, p. 6. The argument is not based on fact. Elder, instead, argued at the Ninth Circuit that Al-Azzawy was distinguishable from the present case. The Ninth Circuit was not prepared to substitute its judgment for Elder's. Its decision to not do so is not inconsistent with this Court's decisions.

II.

> THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE HOLLOWAY IS ENTITLED TO QUALIFIED IMMUNITY SINCE THE LAW WAS NOT CLEARLY ESTABLISHED WHETHER A LAW ENFORCEMENT OFFICER COULD CONDUCT SURVEILLANCE OF A PERSONAL RESIDENCE WITH THE INTENT OF ARRESTING THE SUSPECTED FELON ONCE HE LEFT THE RESIDENCE.

Regardless of which party may have the burden of proof on showing clearly established law, this Court should deny the Petition for a Writ of Certiorari because a reasonable officer under the circumstances of Elder's arrest would not have known whether he was violating clearly established rights. As discussed in the previous section of this brief, the law is clear under Payton that a warrantless arrest cannot be accomplished in a personal residence without exigent circumstances and is equally clear under Watson that a warrantless arrest can be made in a public place. The difficulty is determining whether Elder's arrest came within the decision in Payton or the decision in Watson. The law at the time of Elder's arrest had not clearly defined the issue.

The most analogous case decided by this Court was United States v. Santana, 427 U.S. 38 (1976). Santana involved the arrest of a suspect who was standing in the doorway when the officers arrived at the personal residence. Recognizing that if the person was deemed to have been in the household, a warrantless arrest would not have been appropriate, this Court held that a person standing in the doorway does not have an expectation of privacy. In other words, the suspect was in a public place. 427 U.S. at 42.

The most closely analogous case in the Ninth Circuit, which applied Santana, was United States v. Botero, 589 F.2d 430 (9th Cir. 1979), cert. denied, 441 U.S. 944 (1979). In that case, the Ninth Circuit affirmed the conviction of two individuals for drug related charges. One of the issues on appeal was the warrantless entry into an apartment to make an arrest. The law enforcement officers involved went to the apartment, knocked on the door, and when Botero answered it, they arrested him in the open doorway. On appeal Botero asserted that he was improperly arrested in his home without a warrant. Relying upon Santana, the Ninth Circuit held that Botero could be arrested when he answered the door without the requirement of a warrant.

It is difficult to comprehend how a reasonable officer faced with Holloway's situation could have believed that using a loudspeaker and telephone to contact the individual inside the home was any different than the officer's conduct in Botero in knocking on the door and arresting Botero when he came into the open doorway. Holloway, because he was concerned with the safety of himself and his officers, chose to make contact with Elder by

loudspeaker and telephone. Certainly, that contact with Elder is less intrusive than the conduct of the officers in Botero.

The holding in Botero is more significant to this case than would appear at first blush. Other courts, when confronted with the same issue addressed in Botero, have concluded that an arrest in the doorway cannot be accomplished without a warrant. It was that line of cases upon which Elder relied in making his "constructive entry" argument. Where there is a split of authority among the courts, a law enforcement officer's actions ought to be justified if the federal circuit court of appeals in his area has sanctioned the conduct. At a minimum, it cannot be said in such a situation that there was clearly established law.[7]

Even if Elder had relied upon Al-Azzawy in the District Court as applicable precedent, Holloway would still be entitled to qualified immunity. Al-Azzawy involved a disturbance at a trailer park. A witness informed the officers that an occupant of the trailer park had threatened to shoot him, to blow up the trailer

---

[7] The inquiry concerning whether there was clearly established law under the circumstances of Elder's arrest may be so narrow that Santana and its progeny are not applicable precedent. Anderson v. Creighton, supra, teaches that the contours of the right which is allegedly violated must be sufficiently clear that a reasonable official would understand that what he was doing violated the person's rights. All of the cases cited to the District Court concern circumstances where the officers went to the front door of the residence and the suspect was arrested somewhere near the doorway. Here, Holloway merely attempted to survey the residence and arrest Elder when he voluntarily exited. The only Ninth Circuit precedent to have addressed the latter issue postdates Elder's arrest but does suggest that a surveillance and subsequent arrest is constitutional. United States v. George, 883 F.2d 1407, 1415 (9th Cir. 1989) ("We believe . . . that the officers could have conducted surveillance of the premises and . . . awaited appellant's exit to effect a valid public arrest . . . .").

park and burn the witness' trailer. It was reported to the police that the suspect (Al-Azzawy) had a pistol, a hand grenade and automatic weapons. The police surrounded the trailer with guns drawn and ordered the suspect out of the trailer.

Al-Azzawy was charged with possession of unregistered firearms and being an illegal alien in possession of a firearm. In response to Al-Azzawy's motion to exclude evidence on the basis that he had been arrested in his home without a warrant, the District Court ordered the evidence excluded.

Whether Al-Azzawy was arrested in the trailer or outside the trailer according to the court determined whether the evidence would be excluded. The court did hold that because Al-Azzawy was not free to leave the trailer and his freedom of movement was totally restricted there was an arrest inside the trailer. The inquiry did not end there. The Ninth Circuit determined that the arrest was justified on exigent circumstances.

> . . . [I]f the officers reasonably believe that Appellee possessed illegal explosives and was in an agitated and violent state, there was sufficiently substantial risk to human life to justify a warrantless arrest. (citation omitted)
>
> 784 F.2d at 894.

Al-Azzawy is distinguishable from the present case. Here, the officers went to the residence where Elder was residing only after they unsuccessfully attempted to arrest him outside, and conducted surveillance with the intent of arresting him once he voluntarily exited. In Al-Azzawy the officers went to the trailer, surrounded it with guns drawn, and ordered Al-Azzawy to come

outside. In addition, the portion of the Al-Azzawy decision which determined that an arrest occurred within the residence, is dicta. See, Amended Opinion, p. 5. The holding in Al-Azzawy was that exigent circumstances justified the arrest and permitted admission of the evidence obtained from within the trailer.

Finally, Al-Azzawy actually benefited Holloway's position, not Elder's. The facts in Al-Azzawy are less compelling than those in this case to justify an arrest under exigent circumstances. Al-Azzawy's possession of illegal explosives and his agitated and violent state posed a substantial risk to human life which constituted exigent circumstances. Elder's possession of numerous firearms, the officers' reasonable belief that Elder was extremely dangerous and the information that he would shoot it out with the police also posed a substantial risk to human life. If Elder had relied upon Al-Azzawy, it is likely Holloway would have been granted summary judgment on the basis that the arrest was constitutional -- justified by exigent circumstances. The District Court also could have granted summary judgment to Holloway on the qualified immunity issue because a reasonable officer having read Al-Azzawy would think that he had exigent circumstances to justify Elder's arrest.

Elder very strongly relies in the Petition for a Writ of Certiorari upon the Dissents' Opinions in the Order denying the Petition for Rehearing and rejecting the Suggestion for Rehearing En Banc. The problem with Judge Kozinski's dissent is that he interprets Al-Azzawy as establishing that the law was clearly established at the time Elder was arrested. Judge Reinhardt's

dissent, on the other hand, properly notes that the Amended Opinion interpreted Al-Azzawy differently and recognizes that it is the Amended Opinion's interpretation of the case which must be accepted as its holding. Order, p. 601, n.4.

When judges cannot agree that a case constitutes clearly established law and the plaintiff's lawyer argues the case is distinguishable, the law cannot be clearly established. A law enforcement officer cannot be expected to know what legally trained individuals cannot agree upon. The purpose of providing law enforcement officers with qualified immunity is to protect them from liability in this very situation.

CONCLUSION

The Petition for a Writ of Certiorari should be denied on either of two bases. First, the Ninth Circuit's Amended Opinion is consistent with Supreme Court precedent. Second, Holloway is entitled to qualified immunity because the law concerning Elder's arrest was not clearly established at the time of his arrest.

Respectfully submitted this 28th day of May, 1993.

JAMES J. DAVIS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 17 1992

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

CHARLES K. ELDER; BEVERLY S. ELDER, husband and wife, Plaintiffs - Appellants, v. R. D. HOLLOWAY; OTHER UNKNOWN EMPLOYEES AND/OR AGENTS, individually and in their official capacity as police officers for the Ada County Sheriff's Office, et al., Defendants - Appellees.	No. 91-35146 D.C. No. CV-88-1329-HLR AMENDED OPINION

Appeal from the United States District Court
for the District of Idaho
Harold L. Ryan, District Judge, Presiding

Argued and Submitted October 8, 1991
Seattle, Washington

Filed December 19, 1991
Amended: September 17, 1992

Before: WALLACE, Chief Judge, HUG and RYMER, Circuit Judges

Opinion by Judge Rymer

RYMER, Circuit Judge:

This is a 42 U.S.C. § 1983 action in which Charles Elder claims that his constitutional right not to be arrested inside his home without a valid Idaho warrant was violated when law enforcement officers, after setting up armed surveillance, called him to come outside the house and arrested him on the porch. In opposition to the officers' motion for summary judgment on qualified immunity, Elder proffered three out-of-state cases to

EXHIBIT A

show that the law was clearly established that a warrant was required to make a "constructive entry" into the house. The district court found on the basis of those cases that the law was not clear, and ruled in favor of the officers. We agree with the district court's analysis. There is, however, Ninth Circuit authority which was not called to the attention of the district court that might have alerted a reasonable officer to the constitutional implications of putting a suspect under arrest after he had come outside his house pursuant to an order to exit.

Elder's appeal thus raises a narrow question: whether a summary judgment on qualified immunity in favor of a law enforcement officer which was properly granted on the record presented to the district court, should nevertheless be reversed because there are legal authorities that plaintiff did not present to the district court or to us on appeal which suggest that, contrary to what the district court found, the law was clearly established at the time of the incident. Because the plaintiff in a § 1983 action confronted with a request for judgment on grounds of qualified immunity bears the burden of proving that the constitutional right allegedly violated was clearly established at the time of the incident, we affirm.

I

After receiving word that Charles Elder, who was wanted on Florida warrants and considered dangerous, was in town, officer R.D. Holloway and others in the Ada County Sheriff's Office made plans to arrest him outside his place of work. Elder and his

brother William got wind of the officers' plans, however, left work early, and returned to William's house (where Elder was living, too). Holloway and a number of other officers set up surveillance at the house. When William tried to ride away on horseback, he was detained. Officers found out that Elder had access to weapons in the house. Eventually, Holloway and William made telephone contact with Elder, who meanwhile had suffered two epileptic seizures. Holloway advised him that if he was unable to walk out of the house, he should crawl. Elder walked out a few minutes later, but fell face down, hitting his head and sustaining severe injuries. This happened on April 27, 1987.

Elder's complaint alleges that these events violated his constitutional right not to be arrested in his home without a valid Idaho warrant. Both parties moved for summary judgment.

On the issue of qualified immunity, Elder argued in the district court that the law was clearly established that an Idaho warrant was required to make a "constructive entry" over the threshold. He proffered Payton v. New York, 445 U.S. 573 (1980), for the proposition that, as of April 27, 1987 (when the incident occurred), it was clearly established that the Fourth Amendment prohibited a warrantless entry into a suspect's home to make a routine felony arrest absent consent or exigent circumstances. No one disputed this general principle, and the district court correctly recognized that the law, where there is an actual entry into the home, is clearly established.

Nor did the parties disagree about "the level of generality at which the relevant 'legal rule' is to be identified." Anderson

v. Creighton, 483 U.S. 635, 639 (1987). They disagreed whether, in 1987, there was binding precedent which clearly established when an arrest "constructively" takes place inside a house if no law enforcement officer steps inside the door and the suspect is physically placed under arrest outside the door. Elder proffered three cases in support of his claim that the law clearly established that there was a "constructive entry": State v. Holeman, 693 P.2d 89 (Wash. 1985), State v. Morse, 480 A.2d 183 (N.H. 1984), and Scroggins v. State, 633 S.W.2d 33 (Ark. 1982). The district court reviewed the cases identified by Elder and found there was no controlling Idaho or Ninth Circuit case law on the issue of "constructive entry." That being so, it concluded that the officers could not have violated Elder's clearly established rights when the law was not clear as to when a constructive entry occurs, and the officers could reasonably have believed they could effectuate an arrest outside the door without violating any clearly established right.

On appeal, Elder argues that the law was clearly established that the officers were required to have an Idaho warrant prior to ordering him out of the house, because the facts constitute a constructive crossing of the threshold. Elder identifies the same cases as showing that the law was clearly established that the arrest constructively occurred inside rather than outside his house, as he did in the district court -- Holeman, Morse, and Scroggins -- and also relies on Duncan v. Storie, 869 F.2d 1100 (8th Cir.), cert. denied, 493 U.S. 852 (1989). Duncan post-dates the incident and is therefore not material; it does, however, cite

to United States v. Al-Azzawy, 784 F.2d 890 (9th Cir. 1985), cert. denied, 476 U.S. 1144 (1986).

In Al-Azzawy, police surrounded the suspect's house and, with weapons drawn, ordered him to leave. When he emerged, he was taken into custody. We held that exigent circumstances justified the warrantless arrest. Before reaching this issue, however, we first addressed the question whether the arrest had taken place inside the suspect's house; if not, the issue of exigent circumstances would have been moot. We determined that, even though the suspect had exited the house and was physically seized outside, he was in fact "arrested inside his residence without a warrant." Id. at 893. In so concluding, we reaffirmed the rule that "it is the location of the arrested person, and not the arresting agents, that determines whether an arrest occurs within a home." Id. (quoting United States v. Johnson, 626 F.2d 753, 757 (9th Cir. 1980), aff'd on other grounds, 457 U.S. 537 (1982)). Since we reversed the district court "on the grounds that the warrantless arrest and search were justified by exigent circumstances," id. at 895, our conclusion as to where the arrest took place may be regarded as dicta, unnecessary to this result.

We have no difficulty with the district court's decision on the record it was presented. No case Elder identified clearly established whether an arrest takes place inside or outside the home, when the suspect is inside but is summoned outside by law enforcement officers who have surrounded the premises.

We are, however, troubled by the possibility that Al-Azzawy's initial conclusion might have alerted a reasonable officer to the

constitutional implications of putting a suspect under arrest after he had come outside his house pursuant to an order to exit. Despite the opportunity at oral argument and subsequent briefing, neither party has shed much light on whether Al-Azzawy requires us to reverse despite Elder's failure to rely on it.[1]

"[T]he determination of whether [a] right was so 'clearly established' as to alert a reasonable officer to its constitutional parameters" presents a "pure question[] of law." Romero v. Kitsap County, 931 F.2d 624, 627-28 (9th Cir. 1991); see also Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (referring to the "essentially legal question" of qualified good faith immunity). At the same time, "[t]he plaintiff bears the burden of proof that the right allegedly violated was clearly established at the time of the alleged misconduct. If plaintiff carries this burden, then the officers must prove that their conduct was reasonable even though it might have violated constitutional standards." Romero, 931 F.2d at 627 (citations omitted); Maraziti v. First Interstate Bank, 953 F.2d 520, 523 (9th Cir. 1992).

II

In § 1983 actions where qualified immunity is at issue, it has been the rule that the plaintiff bears the burden of showing that the fact-specific constitutional right allegedly violated was

[1] Elder's view is that "all cases are distinguishable." We assume he takes this position because of Al-Azzawy's ultimate holding, that exigent circumstances justified the officers' conduct in that case. That holding ultimately cuts against Elder in this action, and may explain why he did not proffer Al-Azzawy in opposition to Holloway's motion.

clearly established at the time of the incident since Davis v. Scherer, 468 U.S. 183 (1984), and Bothke v. Fluor Eng'rs and Constructors, Inc., 739 F.2d 484 (9th Cir. 1984), following Davis in this circuit. In Davis, the Supreme Court held that "[a] plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue." 468 U.S. at 197.

Our court has reiterated the burden of proof rule a dozen times since Bothke,[2] but until now we have not been called upon to reconcile it with the equally well settled rule that the determination of whether the constitutional right was clearly established presents an issue of law. We believe that neither rule can be ignored, and hold that the plaintiff's burden in responding to a request for judgment based on qualified immunity is to identify the universe of statutory or decisional law from which the court can determine whether the right allegedly violated was clearly established. The district court's determination of whether that universe of authority clearly established the law so

[2] Maraziti, 953 F.2d at 523; Romero, 931 F.2d at 627; Bryant v. United States Treasury Dep't, 903 F.2d 717 (9th Cir. 1990), rev'd, Hunter v. Bryant, 112 S. Ct. 534 (1991); DiMartini v. Ferrin, 889 F.2d 922, 927-29 (9th Cir. 1989), amended on other grounds, 906 F.2d 465 (9th Cir. 1990), cert. denied, 111 S. Ct. 2796 (1991); Baker v. Racansky, 887 F.2d 183, 186 (9th Cir. 1989); Tribble v. Gardner, 860 F.2d 321 (9th Cir. 1988), cert. denied, 490 U.S. 1075 (1989); Bothke v. Fluor Eng'rs & Constructors, Inc., 834 F.2d 804, 808 (9th Cir. 1987); Tomer v. Gates, 811 F.2d 1240 (9th Cir. 1987); Backlund v. Barnhart, 778 F.2d 1386, 1389-90 (9th Cir. 1985); Fendler v. United States Parole Comm'n, 774 F.2d 975, 980 (9th Cir. 1985).

as to alert a reasonable officer to the constitutional parameters of the right allegedly violated is an issue of law, as to which our review is de novo.

A

Under the rule of Davis v. Scherer, a defendant is presumed to be immune from damages unless the plaintiff shows that the right allegedly violated was clearly established at the time of the conduct at issue. 468 U.S. at 197. Thus, Holloway had qualified immunity unless Elder overcame it by "showing" that the right not to have his house constructively entered was clearly established (or that there are triable issues of fact that must be resolved before a determination can be made whether, as to those specific facts, the law was clearly established). If the plaintiff is not expected to make any "showing" except as to what happened factually, leaving it to the court to come up with the relevant universe of authority from which to find whether the law was clearly established, the Davis rule would be flipped on its head.

Expecting the plaintiff to identify all potentially relevant authorities that bear on the court's determination of whether the law was clearly established comports with the Supreme Court's recent approach to qualified immunity. From Harlow v. Fitzgerald, 457 U.S. 800 (1982), through Davis and Anderson, 483 U.S. at 635, to Hunter v. Bryant, 112 S. Ct. 534 (1991), the Court has made qualified immunity the presumptive norm. which can be overcome if the plaintiff shows that the contours of a fact-specific right are

so clear that a reasonable official would understand that what he is doing violates that right. Requiring the plaintiff to identify the universe of authority that is relevant to the fact-specific right allegedly violated follows naturally from this direction.

While most of our qualified immunity opinions make no mention of who came up with the relevant authority, we have in practice looked to the cases identified by the plaintiff. On several occasions, after stating that the plaintiff bears the burden of proof, we have explicitly indicated which cases the plaintiff identifies, and have discussed only those cases in resolving the appeal. See, e.g., Romero, 931 F.2d at 629 (plaintiffs maintain that despite federal law, decisions of state courts demonstrate law was clearly established; they cite particular case, which court finds did not adjudicate right at issue); Baker v. Racansky, 887 F.2d 183, 188 (9th Cir. 1989) (plaintiffs rely on four cases which they assert clearly established right to hearing or warrant); Backlund v. Barnhart, 778 F.2d 1386, 1389 (9th Cir. 1985) (plaintiffs must show they had clearly established right to exercise religious beliefs about punishment on foster care child; "[t]hey fail to cite any pertinent authority on this issue").[3] At

[3] We simply make explicit in this case what was implicit in Backlund, where we said:

> We do not hold that Section 1983 plaintiffs must always find a case on point in their favor to show that their rights were clearly established. Certainly they need not always produce binding precedent. Capoeman v. Reed, 754 F.2d 1512, 1514-15 (9th Cir. 1985). There may be cases of conduct so egregious that any reasonable person would have recognized a constitutional violation. The Backlunds have failed to show that this was such a case. Indeed, they have failed to show a violation of any constitutional right, clearly established or not.

least two other circuits have indicated that a plaintiff, in order to carry his burden of proving that the law was clearly established (and thus to avoid summary judgment in favor of the defendant), must specifically identify the clearly established law. See Pueblo Neighborhood Health Ctrs., Inc. v. Losavio, 847 F.2d 642, 646 (10th Cir. 1988) (burden is on plaintiff to identify clearly established law; if plaintiff fails to carry this burden, defendant prevails); see also, e.g., Upton v. Thompson, 930 F.2d 1209, 1212 (7th Cir. 1991) ("To prove the presence of a clearly established constitutional right, the plaintiff must point to 'closely analogous cases' decided prior to the defendants' challenged actions."), cert. denied, 112 S. Ct. 1262 (1992).

We therefore hold that in opposing an official's request for judgment based on qualified immunity, the plaintiff's burden includes identifying the universe of relevant statutory or decisional law from which the court can determine whether the right allegedly violated was clearly established. Imposing the burden of proving that the right was clearly established means that a § 1983 plaintiff, confronted with a challenge on grounds of qualified immunity, must show that the particular facts of his case support a claim of clearly established right, and he loses if he does not come forward with statutory or decisional law on which the court can find that the constitutional right allegedly violated was clearly established. See Backlund, 778 F.2d at 1389.

Backlund, 778 F.2d at 1390 (footnote omitted).

B

Although qualified immunity is an "essentially legal question," Mitchell v. Forsyth, 472 U.S. at 526, neither the trial court nor the court of appeals decides what the law is, but instead the question is whether the law with respect to a fact-specific set of circumstances was "so 'clearly established' as to alert a reasonable officer to its constitutional parameters." Romero, 931 F.2d at 627. Whether a right was clearly established requires consideration of legal facts, that is, it requires a balancing by the judge of such things as whether any court has held that a particular constitutional right exists or that conduct similar to that of the officers in the case at hand violates that constitutional right, the number of times the particular right has been recognized and under what circumstances, whether the alleged constitutional right was apparent from the cases even if it had not been expressly recognized, how clear the holdings were, which courts made the decisions, and whether in light of those decisions, a reasonable officer could have believed his conduct to be lawful. The nature of this determination, in light of the burden of proof imposed on the plaintiff to show that the law was clearly established, distinguishes the legal inquiry in qualified immunity cases from both the ordinary civil case and others where constitutional issues are presented. These differences lead us to conclude that appellate review of the resulting determination is appropriately limited to whether the district court erred in concluding that the plaintiff failed to meet his burden on the record of authorities the plaintiff produced.

Whereas normally, a district court has to get an issue of law right, and it does not matter which party presents which authorities (or whether the court uncovers them itself) because the court's decision on a purely legal issue is either right or wrong "as a matter of law," imposing the burden of proving that the law was clearly established on the plaintiff -- as we do in the unique context of qualified immunity -- is without meaning unless the plaintiff has an obligation to produce the legal facts from which the court can determine what the state of the law was at the point of time in the past when the incident occurred. In the ordinary case, the party asserting a claim or defense may have the practical burden of convincing a judge that the law favors his position in the present, but that differs from a legal burden of showing how clearly the law was established at a given point in the past. There may, indeed, be no law that bears on the issue at all, but in the ordinary case that does not mean the proponent will lose. It does, however, mean that the plaintiff must lose in the context of qualified immunity unless the officers' conduct was "so egregious that any reasonable person would have recognized a constitutional violation." Backlund, 778 F.2d at 1390.

Similarly, in other cases where constitutional issues are adjudicated, courts declare what the law is (no matter how fuzzy the precedents), but that is a different obligation from determining what the law with respect to an alleged constitutional right was, and how clear it was. When, for example, the issue on a motion to suppress is whether police officers violated a suspect's constitutional rights by coercing him into a confession,

there is no question that the district court must divine and apply the law correctly, no matter what cases are cited by the parties. The court of appeals has a correlative obligation to correct error when it occurs. But that is not the task when addressing whether government officials are entitled to qualified immunity from damages. The difference has long been recognized, for, as we stated in Backlund, "qualified immunity shields an official from liability for damages only, not from a finding that he violated constitutional rights." 778 F.2d at 1389 n.3 (citing Davis, 468 U.S. at 192-93).

Courts of appeals do not invariably reverse in a civil case whenever a district court gets the law wrong on an issue of law, even if the consequence is that the result would otherwise be different. We do when the legal question is whether a claim for relief is stated, or whether a party is entitled to judgment as a matter of law. We do not when the question is whether instructions accurately state the law, and the party claiming error did not object, see, e.g., Hammer v. Gross, 932 F.2d 842, 847-48 (9th Cir.) (en banc), cert. denied, 112 S. Ct. 582 (1991); Benigni v. City of Hemet, 879 F.2d 473, 477 (9th Cir. 1988); Martinelli v. City of Beaumont, 820 F.2d 1491, 1493-94 (9th Cir. 1987), or invited the error about which he complains on appeal. See, e.g., Benigni, 879 F.2d at 477.[4]

---

[4] We also, of course, do not consider legal issues not raised or ruled upon in the district court. Examples include those matters that can be urged by way of a Rule 12 motion that are waived unless made with the answer, see, e.g., Fed. R. Civ. P. 12(h)(1) (defenses of lack of personal jurisdiction, improper venue, insufficiency of process, and insufficiency of service of process waived if omitted from pre-answer motion, if any, or

The determination of whether a specific right was clearly established is closer to the latter kind of "issue of law" than the former. In an adversary system where the plaintiff has the burden of showing that a specific right was clearly established in the law, if the court "gets it wrong" because the universe of cases proffered by the plaintiff in support of his claim that the right was clearly established turns out to be less than all of the potentially relevant legal facts, the plaintiff has invited whatever error occurs.

Defining the plaintiff's burden to include identification of relevant authority in the unique context of qualified immunity should have no unsettling effect on the orderly development of constitutional law. So far as the particular case is concerned, the district court may still find that the plaintiff's

---

answer); Benny v. Pipes, 799 F.2d 489, 492 (9th Cir. 1986) (A "general appearance or responsive pleading by a defendant that fails to dispute personal jurisdiction will waive any defect in service or personal jurisdiction."), amended on other grounds, 807 F.2d 1514 (9th Cir.), cert. denied, 484 U.S. 870 (1987); Chilicky v. Schweiker, 796 F.2d 1131, 1135-36 (9th Cir. 1986) (if party files pre-answer motion but fails to raise defense of lack of personal jurisdiction in that motion, defense is waived), rev'd on other grounds, 487 U.S. 412 (1988); and issues that could have been joined by a motion for directed verdict, but cannot be pressed on appeal unless that motion is made, see, e.g., Gilchrist v. Jim Slemons Imports, Inc., 803 F.2d 1488, 1493 (9th Cir. 1986) (sufficiency of evidence not reviewable on appeal unless motion for directed verdict was made in trial court); United States v. 33.5 Acres of Land, 789 F.2d 1396, 1400 (9th Cir. 1986) (same, but noting limited exception for plain error resulting in manifest miscarriage of justice). We never consider facts not presented to the district court. United States v. Elias, 921 F.2d 870, 874 (9th Cir. 1990). And, the relevant record on review of summary judgments is the record as it existed at the time the motion was considered. Harkins Amusement Enters., Inc. v. General Cinema Corp., 850 F.2d 477, 482 (9th Cir. 1988), cert. denied, 488 U.S. 1019 (1989).

constitutional rights were violated even though at the time of the incident, the right was not so clearly established that an official should have to respond in damages for his conduct. Backlund, 778 F.2d at 1389 n.3 (citing Davis, 468 U.S. at 192-93). By the same token, an appellate decision that the district court did not err on the record before it in determining that a right was not clearly established based on the universe of authorities produced by the plaintiff is precedential only on whether the specific right allegedly violated was clearly established at a particular point in time, see Baker, 887 F.2d at 187 (post-incident cases which considered whether law governing child abuse investigations was clearly established in 1986, at time of incident in question, are relevant persuasive authority on this issue); it has no precedential effect on whether such a constitutional right exists or was violated, or as to a subsequent case where the record is different.

Accordingly, we shall review the district court's determination that a § 1983 plaintiff has (or has not) met the burden of showing that the law was clearly established for purposes of overcoming an official's request for judgment on grounds of qualified immunity for whether its conclusion was correct based on the legal facts identified by the plaintiff.

III

Our holding does not mean that it is inappropriate for a district court to come up with relevant law on its own, anymore than it is inappropriate for a district judge to ask questions and

thereby elicit evidence on his own. However, the district court has no obligation to do either in the unique context of qualified immunity. Where the plaintiff bears the burden of proof that the law was clearly established, as the plaintiff does in overcoming a request for judgment on the ground of qualified immunity, and based on the record adduced fails to meet it, we hold only that the district court does not commit reversible error by failing to fill in the holes.

We are satisfied that no injustice results to Elder. First, the unproffered authority, Al-Azzawy, is not entirely advantageous. Because our ultimate holding in that case was expressly grounded on the conclusion that exigent circumstances justified the suspect's arrest and the subsequent warrantless search, 784 F.2d at 895, our initial conclusion that the arrest had taken place "inside" the house was unnecessary dicta. Given our adversary system, we are unwilling to say that Elder should be stuck with our take on a case that his counsel thinks is distinguishable, but rather believe that when the plaintiff has the burden of adducing the legal facts necessary to prove that the law was clearly established, the record upon which that determination is made is his call rather than ours. Second, assuming that Elder's failure to proffer Al-Azzawy was inadvertent, and the district judge did not find it either, we are hard-pressed to say that the law was so clearly established that a reasonable law enforcement officer in Holloway's shoes would understand that what he was doing violated a constitutional right. See Ward v. County of San Diego, 791 F.2d 1329, 1332 (9th Cir.

1986) (the court does not "require of most government officials the kind of legal scholarship normally associated with law professors and academicians"), cert. denied, 483 U.S. 1020 (1987).

For these reasons we conclude that the plaintiff in a § 1983 action, who bears the burden of showing that the constitutional right allegedly violated was clearly established at the time of the alleged misconduct, must identify the body of law which proves that the right was so clearly established that a reasonable officer would be alerted to its constitutional parameters. If the universe of statutory or decisional law proffered by the plaintiff does not show that the right allegedly violated was clearly established at the time of the incident, the district court does not commit reversible error by considering only the legal facts presented and determining, correctly, that based on those legal facts the plaintiff has not shown that the contours of the right were clear.

AFFIRMED.

Supreme Court, U.S.
FILED
AUG 6 1993
OFFICE OF THE CLERK

No. 92-8579

IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

CHARLES K. ELDER,

Petitioner

v.

R. D. HOLLOWAY, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

JOINT APPENDIX

JOHN C. LYNN
LYNN, SCOTT, HACKNEY & SULLIVAN
1015 West Hays Street
Boise, Idaho 83702
(208) 342-7600
Counsel for Petitioner

JAMES J. DAVIS
960 Broadway, Suite 302
P.O. Box 8126
Boise, Idaho 83701
(208) 336-3244
Counsel for Respondent

PETITION FOR WRIT OF CERTIORARI FILED APRIL 19, 1993
CERTIORARI GRANTED JUNE 28, 1993

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
Relevant Docket Entries	1
Memorandum Opinion And Order Of The United States District Court For The District Of Idaho, November 20, 1990	2
Judgment United States District Court For The District Of Idaho, November 21, 1990	23
Opinion Of United States Court Of Appeals For The Ninth Circuit, December 19, 1991	24
Amended Opinion Of United States Court Of Appeals For The Ninth Circuit, September 17, 1992	31
Order Denying Rehearing Of United States Court Of Appeals For The Ninth Circuit, January 27, 1993	46
Order Of Supreme Court Of The United States Granting Certiorari And Leave To Proceed In Forma Pauperis, June 28, 1993	70

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
9/30/88	Complaint Filed
6/1/89	Motion by plaintiff for partial summary judgment
8/30/90	Motion by defendants for summary judgment
11/6/90	Hearing on motions for summary judgment
11/21/90	Memorandum Opinion and Order
12/20/90	Notice of Appeal

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 88-1329

CHARLES K. ELDER and BEVERLY S. ELDER,
husband and wife,
Plaintiffs,

v.

R. D. HOLLOWAY, AND OTHER UNKNOWN EMPLOYEES AND AGENTS individually, and in their official capacity as police officers for the Ada County Sheriff's Office; VAUGHN KILLEEN, as Sheriff of Ada County; and the COUNTY OF ADA,
Defendants.

MEMORANDUM OPINION AND ORDER

I. FACTS AND PROCEDURE

This suit arises out of the arrest and seizure of the plaintiff, Charles Elder, on April 27, 1987. The defendants in this action are Lieutenant R. D. Holloway, the officer in charge of the arrest, Ada County Sheriff Vaughn Killeen, who was present during the arrest, the County of Ada, and other unknown employees and/or agents. After receiving certified copies of two Florida arrest warrants for the arrest of Mr. Elder, Defendant Holloway made arrangements to arrest Mr. Elder in a public place, his place of work. However, before Mr. Holloway could arrest Mr. Elder at his place of work, Mr. Elder and his

brother William Elder, who also worked at the same place, got word of the officer's intent, and left work early. Lt. Holloway and other officers, after finding out that the Elders had left work, proceeded to William Elder's residence, which was where Charles Elder was also residing at the time. The officers, once they arrived in the area, set up surveillance of the residence. They observed the Elder brothers loading what appeared to be camping equipment into a pickup. William Elder then was seen riding away from the home on horseback. The officers detained William, and confirmed with William that his brother was still in the house. William also told the officers that his brother had access to several firearms in the home. The officers then attempted to make telephone contact with Charles, but were unsuccessful until William used the police loudspeaker to convince Charles to answer the phone. By this time, other officers had arrived near the area and had blocked off the roads coming into the neighborhood. During the telephone conversation between Charles and William, the officers were advised that Charles had fallen inside the house after he suffered an epileptic seizure. During this conversation, Plaintiff Elder suffered another seizure. After he had recovered from this second seizure, Lt. Holloway began speaking on the phone with Charles. Lt. Holloway advised Charles that if he could not walk out of the house, then he should crawl out. After a few minutes, Charles did walk out of the residence. However, upon exiting the house, he took one step, turned slightly, and fell face down, hitting his head on the concrete walk which caused severe injuries. Emergency medical technicians were then called, and they arrived, treated Mr. Elder and transported him to the hospital.

Plaintiffs, Mr. Elder and his alleged common law wife, filed this suit on September 30, 1988. Three of the counts in the complaint pertain to alleged violations of 42 U.S.C. § 1983, and two counts deal with common law tort claims.

Plaintiffs claim that the arrest was a violation of Mr. Elder's constitutional rights which require that the defendants have a valid Idaho arrest warrant before seizing him in his home.

On June 1, 1989, the plaintiffs moved for partial summary judgment on Count One as against Lt. Holloway on the issue of liability. On July 6, 1989, the defendants filed their memorandum in opposition to this motion. The defendants, on August 30, 1990, filed their Motion for Summary Judgment. On October 19, 1990, the plaintiffs filed their memorandum in opposition to this motion, and on October 29, 1990, the defendants filed their reply brief.

On November 6, 1990, this court held a hearing on all pending motions to address the cross-motions for summary judgment. Having thoroughly reviewed the statements of counsel, along with the memoranda, affidavits, and exhibits in the record, and based upon the analysis to follow, the court has determined that defendants' Motion for Summary Judgment should be granted.

II. ANALYSIS

A. *Summary of Cross-Motions*

1. *Plaintiffs' Motion for Partial Summary Judgment.*

In this motion, plaintiffs seek summary judgment against Defendant Holloway on Count One as to his liability only. Count One is a claim against Lt. Holloway and his subordinates for the unreasonable seizure of Mr. Elder, which in turn resulted in Mr. Elder sustaining severe brain damage by his fall. Plaintiffs argue that without a valid Idaho arrest warrant, the defendants could not arrest Mr. Elder in his brother's home, unless there were exigent circumstances for a warrantless arrest. This is clearly the law, and the defendants do not dispute this. *State v. Bradley,*

106 Idaho 358, 679 P.2d 635 (1984) (where the court held that the officers cannot make a warrantless nonconsentual entry in the home of the suspect to arrest him, without exigent circumstances); *Payton v. New York,* 445 U.S. 573 (1980).

Plaintiffs argue that for all practical purposes, the arrest occurred in the home because Mr. Elder was restrained in the home, once the defendants "constructively crossed" the threshold of the home by surrounding the home and requesting by police loudspeaker and telephone that Mr. Elder come out. Memorandum in Support of Motion for Partial Summary Judgment, filed June 1, 1989, at 5-6. In support of this argument, the plaintiffs point to the following "undisputed facts": (1) several armed officers surrounded the house; (2) roadblocks were established in the area of the residence; (3) plaintiff's brother William was detained and prevented from returning to his home; (4) Lt. Holloway did intend to arrest Charles Elder; and (5) a police loudspeaker and telephone were utilized to communicate with Mr. Elder that he should surrender. *Id.* at 7.

2. *Defendant's Motion for Summary Judgment.*

Initially, the defendant sets forth the prima facia case for establishing a 42 U.S.C. § 1983 claim. Simply stated, the plaintiffs must prove: (1) that the conduct complained of was committed by a person under the color of state law, and (2) that the conduct deprived the plaintiff of a constitutional right. *Rinker v. County of Napa,* 831 F.2d 829, 831 (9th Cir. 1987). There is no dispute as to the first element. However, the defendants argue that none of plaintiff's constitutional rights were violated.

Defendants' arguments can be summarized as follows.

(a) *The arrest conducted outside the home was valid even without a valid Idaho arrest warrant.* The defend-

ants note that the plaintiffs argue that even though Idaho statutory law [1] can be interpreted as allowing an arrest without a warrant, the case law clearly requires that the officers have a valid Idaho arrest warrant to arrest an individual in his home. The defendants do not clearly dispute this; they simply attempt to distinguish *Bradley* and *Payton*, and argue that the arrest was made outside the home. Memorandum in Support of Motion for Summary Judgment, filed August 30, 1990, at 8-10.

(b) *If the court finds that this was a constructive entry, then the arrest was still valid because there existed probable cause (based on the information received and the existence of the Florida warrants) and Mr. Elder was in plain view. Id.* at 10-11. However, the court finds that this argument clearly does not take into consideration the courts' findings in *Bradley*, *Payton*, and *United States v. Santana*, 427 U.S. 38 (1976).

(c) *Exigent circumstances existed that would excuse the arrest warrant requirement.* Citing a variety of authorities, defendants set forth several factors which justify a finding of exigent circumstances in this case: (1) suspect believed to be wanted for crime of violence, (Elder was wanted for aggravated battery) *United States v. Salvador*, 740 F.2d 752 (9th Cir. 1984); (2) suspect believed to be armed (several individuals informed the officers that Elder possessed and had access to guns, and in addition, sources had stated that Elder told them that he would not be arrested and would shoot it out with police) *id.*; (3) there was a clear showing of probable cause (the magistrate's signature on Florida warrants) *United States v. Davis*, 785 F.2d 610 (8th Cir. 1986); (4) suspect believed to be in the premises (officers saw

[1] Idaho Code § 19-4514 (1987) provides in part: "The arrest of a person may be lawfully made . . . without a warrant upon reasonable information that the accused stands charged with a felony by the courts of another state . . . ."

Elder enter the house) *People v. Abney*, 407 N.E.2d 543 (1980); (5) likelihood of flight (brothers packing camper) *United States v. Williams*, 612 F.2d 735 (3d Cir. 1979); and (6) entry can be peaceable and during daylight hours (officers gave Elder an opportunity to surrender, the only possible entry was telephone contact with Elder, and these events occurred during the day) *United States v. Davis*, 785 F.2d 610 (8th Cir. 1986). Based on these factors, the defendants argue that a constructive entry was necessary in order to prevent the potential harming of others inside or outside the premises which was located in a residential area. Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment, filed July 6, 1989, at 18-23; Memorandum in Support of Motion for Summary Judgment, filed August 30, 1990, at 11-12.

(d) *If the court finds that no exigent circumstances existed, then the defendants are still protected by qualified good faith immunity doctrine.* The defendants note that this is an affirmative defense that must be proved by them; however, they note that courts have granted summary judgment on this issue if the pleadings and affidavits indicate that there are no genuine issues of material fact. *Id.* at 12 (*citing Harris v. City of Roseburg*, 664 F.2d 1121, 1129 (9th Cir. 1981), and *Kipps v. Ewell*, 538 F.2d 564, 566 (4th Cir. 1976)).

According to the defendants, the test for whether or not they are entitled to qualified immunity under the facts is, "[s]hould a reasonable person in the shoes of the individual police officer have known that he was violating another's . . . clearly established constitutional rights?" Memorandum in Support of Motion for Summary Judgment, filed August 30, 1990, at 14 (*citing Ngiraingas v. Sanchez*, 858 F.2d 1368, 1374 (9th Cir. 1988), *aff'd* —— U.S. ——, 110 S.Ct. 1737 (1990)). Applying this standard, the defendants claim that Lt. Holloway

knew he could not enter the home without a warrant; however, he in good faith believed he could serve the warrants outside the home in public without a valid Idaho warrant. Defendants argue that the law is unclear in Idaho, as to whether there can be a "constructive entry," and therefore, defendants' conduct did not violate clearly established statutory or constitutional law. Memorandum in Support of Motion for Summary Judgment, filed August 30, 1990, at 12-14.

(c) *There is no affirmative link between the alleged violations and the adoption of a policy authorizing the alleged misconduct; therefore, the claims against Ada County and the Sheriff should be dismissed.* Under the law, a municipality cannot be held liable on a respondeat superior theory unless there exists an affirmative link between the violations complained of and the adoption of any plan or policy of the agencies or persons showing authorization or approval of the misconduct. *Monell v. Department of Social Serv. of New York*, 436 U.S. 658, 691 (1978); *Rizzo v. Goode*, 423 U.S. 362, 370 (1976). The defendants also cited a Sixth Circuit case which, in addressing this standard, stated:

> The result of *Rizzo*, and subsequent cases in the lower federal courts applying the standards it announced is that a failure of a supervisory official to supervise, control, or train the offending individual officers is not actionable absent a showing that the official either encouraged the specific incident of misconduct or in some other way directly participated in it. At a minimum a plaintiff must show that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers.

Hays v. Jefferson County, Kentucky, 668 F.2d 869, 874 (6th Cir.), *cert. denied*, 459 U.S. 833 (1982).

Applying this standard, the defendants argue that there is no evidence that Sheriff Killeen's or Ada County's failure to supervise or train their officers caused any injury to the plaintiffs. There is no evidence in the record to indicate that these officials in any manner authorized, approved or knowingly acquiesced in the alleged unconstitutional conduct of the officers making the arrest.[2] Memorandum in Support of Motion for Summary Judgment, filed August 30, 1990, at 17-18.

In addition, the defendants in oral arguments cited the court to *Pembaur v. Cincinnati*, 475 U.S. 469 (1986), a United States Supreme Court decision where the court further clarified the defendants' position that Ada County and the Sheriff cannot be found liable under Section 1983 because they did not make a deliberate choice to make public arrests in the manner executed by Lt. Holloway in this case. In *Pembaur*, the Court stated:

> We hold that municipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.

Id. at 483-84.

---

[2] It should be noted that according to Lt. Holloway's deposition, the Sheriff, although present at the scene, did not give any orders or take part in the arrest.

> "Q All right. Now, was the sheriff himself involved—I'm talking Vaughn Killeen—in this incident?
> "A [Lt. Holloway] He was at this incident.
> "Q Okay. What was his role?
> "A He didn't do anything, other than he was there, observed what was happening, and obviously was my supervisor. But as far as giving directions on this situation, he was not involved in it."

Reply Memorandum in Support of Motion for Summary Judgment, filed Oct. 29, 1990, Excerpts of Holloway Deposition at 18.

(f) *Count Four of the Complaint falls within Idaho Code § 6-904, and therefore should be dismissed.* Idaho Code § 6-904 [3] provides for governmental immunity for false arrests. Defendants' claim that the plaintiffs in Count Four are seeking damages against Ada County and the Sheriff for injuries they sustained as a result of a false arrest, and that pursuant to Section 6-904, these parties are not liable for these claims. They also assert that the plaintiffs cannot seek redress for both a Section 1983 claim and a common law tort claim, because these claims both seek the same relief. Memorandum in Support of Motion for Summary Judgment, filed August 30, 1990, at 18-19.

(g) *The consortium loss claim, Count Five, should also be dismissed as it is wholly derivative of the other claims.* Defendants argue that if the other counts are dismissed, then this count fails as a matter of law as a consortium claim is a derivative claim. *Runcorn v. Shearer Lumber Prod., Inc.*, 107 Idaho 389, 394, 690 P.2d 324, 329 (1984). Defendants also assert that the claim should fail because the plaintiffs were not married at the time Mr. Elder was injured. They were divorced in 1974 and lived with each other off and on through February of 1987. They reject plaintiffs' argument that they had a valid common law marriage, and argue that Florida law does not recognize common law marriages after 1967. Memorandum in Support of Motion for Summary Judgment, filed August 30, 1990, at 19-20.

---

[3] Idaho Code § 6-904 (1990) provides in part that:

> A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which:
>
> . . . .
>
> 3. Arises out of assault, battery, false imprisonment, *false arrest*, malicious prosecution, abuse of process, libel, slander, misrepresentation . . . . (emphasis added)

In their reply brief, defendants assert that Michigan law also does not recognize common law marriages after 1957, so that Idaho would be the only law that the plaintiffs could make this claim under. They argue that a close reading of Beverly Elder's deposition will indicate that no common law marriage existed in Idaho. They claim that in the deposition, Ms. Elder indicates that when they lived in Idaho, they did not live together, nor did they consider themselves married.

B. *Analysis of Pending Motions.*

1. *The validity of the arrest.*

The threshold question that this court must address as it considers these cross-motions for summary judgment is, whether or not it is clearly established in Idaho law that an officer, under the circumstances of this case—where officers surrounded the house, requested the individual to exit the house and that individual complies—must have a valid Idaho arrest warrant in order to arrest that individual. This court finds that there is no clearly established statutory or case law in Idaho or the Ninth Circuit which addresses this issue. It is not disputed among the parties that if the arrest would have actually occurred in the home, then the officers would have had to have a valid Idaho arrest warrant, and possibly a valid Idaho search warrant.[4]

The Idaho Supreme Court in *State v. Bradley*, 106 Idaho 358, 670 P.2d 635 (1983), following the law announced by the United States Supreme Court in *Payton v. New York*, 445 U.S. 573, 577 (1980), found that

---

[4] The search warrant may have been required in that the home that Charles Elder was residing in at the time, the home at which the arrest was made, was the home of his brother, William Elder. The court notes that this issue was not addressed by the parties, and therefore, this court will not review this issue.

absent exigent circumstances or consent, officers must have a valid Idaho arrest warrant to enter a defendant's private residence in order to make an arrest, even if the officers have a valid arrest warrant from a sister state. The law in this area, where this is an actual entry into the home, is, therefore, clearly established.

Unfortunately, that is where the clarity ends. The court has found no Idaho or Ninth Circuit law which addresses the issue of whether a valid Idaho arrest warrant is necessary in order to make a "constructive entry" into the home to make an arrest. The court was also unsuccessful in finding any law in Idaho or the Ninth Circuit that addresses the issue of what constitutes a "constructive entry" or "constructive crossing of the threshold."

The plaintiffs cite the court to two cases, *State v. Holeman*, 103 Wash.2d 426, 693 P.2d 89 (1985), and *Scroggins v. State*, 276 Ark. 177, 633 S.W.2d 33 (1982), which they claim are persuasive in this area. However, neither of these cases are directly on point, and neither case is from this state or this circuit. In *Holeman*, the officers who executed the arrest reached through the doorway and physically grabbed the individual who was standing in the doorway. The court there held that this was clearly a crossing of the threshold which required an arrest warrant.

In *Scroggins*, the court dealt with the situation in which the officers knocked on the door of the suspects' motel room and when the suspects answered, they pulled their guns and ordered the suspects out of the house. Once the suspects exited the motel, the officers effectuated the arrest. The court does not find *Holeman* and *Scroggins* persuasive as they both are clearly distinguishable from the case at bar. In the case at bar, the officers did not physically cross the threshold to grab Mr. Elder by the arm and pull him out of the house, nor did the officers knock on the door, wait for Mr. Elder to answer, and

then pull their guns on him and demand that he come out of the house.

The case law in this area clearly supports the view that the significant point of analysis is the threshold, and that if the person is outside his doorway, in an area with public access, then he no longer has the protection of requiring a warrant. *State v. Bradley*, 106 Idaho 358, 679 P.2d 635 (1984); *United States v. Karagozian*, 715 F.Supp. 1160 (D.Conn. 1989) (where the court held that a secluded rear deck of a home still has the same privacy expectations as the home because this is not a place, like the driveway, with ready access to visitors, nor was it visible to the public). Based on this analysis, the court finds that once Mr. Elder stepped out of the front door of his brother's house, onto the public access sidewalk of the home, a public arrest was made unless he can show that he did not exit the house voluntarily, or unless he can show that the area where he was arrested was secluded from public access and deserving of the same expectation of privacy as the home itself. These questions clearly present genuine issues of material facts that prevent this court from entering summary judgment on this issue.

The Eighth Circuit, in *Duncan v. Storie*, 869 F.2d 1100 (8th Cir.), *cert. denied*, —— U.S. ——, 110 S.Ct. 85 (1989), addressed a similar question concerning similar facts. In *Duncan*, the plaintiff brought a Section 1983 claim, alleging unlawful arrest and excessive use of force. The main question in the case was whether a public arrest occurred in the doorway of the plaintiff's house. Because the court found that there existed genuine issues of material fact concerning whether or not a public arrest was made, the court refused to grant summary judgment. The court summed up the law in this area very clearly when it stated:

Depending upon whether Duncan was arrested in his home or outside in a public place, different standards apply . . . . If an individual voluntarily left the confines of his home, as Storie and Whitted claim that Duncan did, then the arrest was made in a public place. *United States v. Santana*, 427 U.S. 38, 42, 96 S.Ct. 2406, 2409, 49 L.Ed.2d 300 (1976). Under these circumstances, the individual has no expectations of privacy and the arresting officers need only demonstrate that there was probable cause in order to justify a warrantless arrest. . . . However, a warrantless arrest that occurs inside an individual's home is unconstitutional unless the officers demonstrate the existence of probable cause and exigent circumstances.

The doorway of an individual's home or apartment or hotel room may be a public place for the purpose of making a warrantless arrest *if the individual has come to stand in the doorway voluntarily. See United States v. Whitten*, 706 F.2d 1000, 1015 (9th Cir. 1983). However, an individual who is *compelled* to stand in a doorway cannot be lawfully arrested without the existence of probable cause and exigent circumstances.

Duncan v. Storie, 869 F.2d at 1102 (citations and footnote omitted) (emphasis added).

The *Duncan* court emphasized that the focus should not be on the exact location of the individual in relation to the doorway, but instead, the crucial issues are whether the individual had an expectation of privacy, and whether the individual came to the door voluntarily. *Id.* Applying this law, the court, in denying defendant's motion for summary judgment, found that it could not hold as a matter of law, that the individual "voluntarily placed himself in a public place and willingly relinquished the expectation of privacy that he is entitled to when he is within his home." *Id.* at 1103.

Applying this analysis to the facts in this case provides the court with ample grounds to deny plaintiffs' Motion for Partial Summary Judgment, and defendants' Motion for Summary Judgment on the issue of whether the arrest was valid. The court finds that there still are genuine issues of material fact concerning whether Mr. Elder placed himself voluntarily in a public place, and whether he willingly relinquished his expectation of privacy. As noted above, the defendants argue that they did not coerce Mr. Elder out of the home, but instead, that Mr. Elder's brother was the one who talked to Mr. Elder on the phone and police loudspeaker. They further assert that if Mr. Elder would not have come out into the public place voluntarily, *then* they would have obtained an Idaho search and arrest warrant. The court finds that there is ample evidence to support a finding that there still exists genuine issues of material fact on this issue.

2. *Exigent circumstances.*

If this court were to hold that there was a "constructive entry" into the home, and therefore, the defendants had to obtain a valid Idaho arrest warrant, the defendants argue that the warrant requirement would be excused because of the existence of exigent circumstances. As noted above, the defendants cite several factors that Lt. Holloway testified to in his deposition that constitute exigent circumstances. Despite conceding that Mr. Elder was wanted for felony charges in Florida, and that he said he would not be arrested, and that he had access to guns in the house, plaintiffs argue that these factors alone or together do not constitute exigent circumstances. Plaintiffs' Response to Defendants' Memorandum in Support of Motion for Summary Judgment, filed Oct. 19, 1990, at 5-6.

Plaintiffs argue that under *Michigan v. Tyler*, 436 U.S. 499, 509 (1978), the unifying question under the case law for determining whether exigent circumstances exist,

is whether or not "there is compelling need for official action and no time to secure a warrant." Plaintiffs assert that the warrantless entry should be upheld only if there was "a 'compelling need' to avoid an imminent risk of danger to life or property, destruction or loss of evidence, or escape of the suspect." Plaintiffs' Response to Defendant's Memorandum in Support of Motion for Summary Judgment, filed on Oct. 19, 1990, at 6-7 (citation omitted).

The plaintiffs assert that the facts indicate that this was not an exigent circumstance because the police had planned the arrest five days before the incident, and that the police themselves created the exigency by surrounding the home and ordering Mr. Elder out of the house. They argue that there was not a compelling need to suspend the warrant requirement because there was not any risk of danger to anyone, there was no risk of evidence being destroyed, and there was no risk of flight. *Id.* at 7-10. These assertions alone clearly create genuine issues of material facts. This court, therefore, finds that whether or not, under these circumstances, exigent circumstances existed to excuse the requirement that officers have a valid Idaho arrest warrant is a question of fact, which prevents this court from entering summary judgment in favor of the defendants on this issue.

3. *Qualified immunity.*

This court's analysis on whether or not there was a valid arrest under the circumstances in this case controls the outcome on the issue of qualified immunity. Plaintiffs, under their Section 1983 claims, argue that they are entitled to recover against the defendants because the defendants violated clearly established constitutional rights, specifically, Mr. Elder's right not to be arrested in his brother's home without a valid Idaho arrest warrant. Defendants assert that even if the court were to find that a valid Idaho arrest warrant was required to make an

arrest, and even if the court found that there were no exigent circumstances to justify the warrantless arrest, the court must still find in favor of the defendants because they are protected by the doctrine of qualified good faith immunity. The court is persuaded by defendants' argument.

In *Malley v. Briggs*, 475 U.S. 335 (1986), the Supreme Court, in further defining the qualified immunity standard set forth in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), stated: "Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." *Malley v. Briggs*, 475 U.S. at 341. *See also, Los Angeles Police Protective League v. Gates*, 907 F.2d 879, 887-88 (9th Cir. 1990).

In terms of this case, the defendants restate this standard as "whether no reasonable officer could have believed that an Idaho warrant was not required for an arrest upon Bill Elder's front porch." Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment, filed July 6, 1989, at 15. In *Ngiraingas v. Sanchez*, 858 F.2d at 1374, the Ninth Circuit, in adopting the Third Circuit's standard, stated that:

> Deciding whether a police officer has acted in good faith is no easy task. As a general matter, however, we note that good faith immunity is judged "by an objective standard, not by examination of the subjective state of mind of the officer." . . . *The relevant question is . . . "[W]ould or should a reasonable person in the shoes of the individual police officer have known that he was violating another's . . . clearly established constitutional rights . . ."?*

Id. (citation omitted) (emphasis added).

As stated above, the law is clearly established that absent consent or exigent circumstances, officers must obtain a valid arrest warrant prior to crossing the threshold of a home to arrest an individual. *State v. Bradley*, 106 Idaho 358, 670 P.2d 635 (1983); *Payton v. New York*, 445 U.S. 573, 577 (1980). However, the law is not clear—in fact, the court has found no controlling Idaho or Ninth Circuit case law—on the issue of "constructive crossing of the threshold." The law is uncertain as to what even constitutes a "constructive crossing." These questions appear to be questions of fact, that must be dealt with on a case-by-case basis. There is certainly no statutory or case law that provides that a constructive crossing of the threshold occurs when the officers surround the house, and then attempt to make contact with the individual in the home.

Therefore, the defendants in this case could not have been violating plaintiff's clearly established rights when the law was far from certain as to when a constructive entry occurs, and there exists no official policy relating to getting a suspect out of his home by telephone or police loudspeaker. There is no way that any individual officer, under the circumstances of this case, could have known that he was violating another's clearly established constitutional rights when those rights were not yet clearly established. Until the law is better defined, it appears to this court that officers in similar circumstances could make an arrest outside the home if they in good faith believed that they could effectuate the arrest without violating any clearly established constitutional rights. The officers in this case clearly acted reasonably under the circumstances as it was their understanding of the law, and it was provided for in Ada County's arrest and custody policy [5],

[5] *See* Exhibit D attached to Plaintiffs' Response to Defendants' Memorandum in Support of Motion for Summary Judgment, filed October 19, 1990, which is a copy of Ada County's "arrest and custody" policy that was in effect at the time of the arrest.

that as long as they made the arrest outside the home, they could make the arrest without an Idaho arrest warrant. It appears from the record that officers reasonably believed that their actions were constitutional; therefore, no liability attaches to their actions.

4. *Application of summary judgment standard.*

In *Harris v. City of Roseburg*, 664 F.2d 1121 (9th Cir. 1981), the Ninth Circuit, in addressing the doctrine of qualified good faith immunity, has stated that even though this defense is an affirmative defense that must be proved by the police officers, summary judgment is still appropriate if the pleadings and affidavits indicate that there are no genuine issues of material fact. In affirming the district court's granting of summary judgment in favor of the police officers, the court stated:

> "The non-movant has an affirmative duty to come forward to meet a properly supported motion for summary judgment . . . ." [W]e find that the affidavits and depositions set forth facts, which, if accepted, would entitle Bergman [the officer] to summary judgment. With respect to Bergman's good faith defense, plaintiff has not raised any triable issues of fact as to whether Bergman reasonably believed that his actions were proper.

Id. at 1129-30 (citation omitted).

It is well settled that a party in defending against a motion for summary judgment may not simply rest upon the bare pleadings.[6] As the Ninth Circuit stated in *United*

[6] *See also* Fed. R. Civ. P. 56(e), which provides in part:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is an genuine issue for trial. If the adverse party does

States v. Allen, 578 F.2d 236 (9th Cir. 1978): "In order successfully to oppose a motion for summary judgment, a party may not rely solely on conclusory allegations in the pleadings . . . but must, instead, offer some evidence at least outlining a factual dispute." *Id.* at 237 (citations omitted).

Moreover, under Rule 56, it is clear that an issue in order to preclude entry of summary judgment must be *both* "material" and "genuine." An issue is "material" if it affects the outcome of the litigation. An issue, before it may be considered "genuine," must be established by "sufficient evidence supporting the claimed factual dispute . . . to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Hahn v. Sargent*, 523 F.2d 461, 464 (1st Cir. 1975) (*quoting First Nat'l Bank of Arizona v. Cities Serv. Co., Inc.*, 391 U.S. 253, 289 (1968)). The Ninth Circuit cases are in accord. *See e.g., British Motor Car Distrib., Ltd. v. San Francisco Automotive Indus. Welfare Fund*, 882 F.2d 371 (9th Cir. 1989).

According to the Ninth Circuit in order to withstand a motion for summary judgment a party

> (1) must make a showing sufficient to establish a genuine issue of fact with respect to any element for which it bears the burden of proof; (2) must show that there is an issue that may reasonably be resolved in favor of either party; and (3) must come forward with more persuasive evidence than would otherwise be necessary when the factual context makes the non-moving party's claim implausible.

Id. at 374 (citation omitted).

---

not so respond, summary judgment, if appropriate, shall be entered against the adverse party."

U.S.C.S. Rules of Civil Procedure, Rule 56(e) (Law. Co-op. 1987 & Supp. 1990).

The court finds that on the issue of whether the officers acted in good faith when they arrested Mr. Elder without a warrant outside his brother's home, the plaintiffs have failed to raise any triable issues of fact as to whether Lt. Holloway believed that his actions were proper.

C. *Conclusion*

Based on the foregoing analysis, the applicable standards under Rule 56, and the direction given by the Ninth Circuit in considering these issues, the court finds under the doctrine of qualified good-faith immunity, the defendants are entitled to summary judgment. Because all the other claims asserted by the plaintiffs are derivative of the claims against the officers—that is, without a finding that the officers had violated plaintiffs' rights, the plaintiffs could not prevail on their other claims—the court finds that Ada County and Sheriff Vaughn Killeen are also entitled to summary judgment. The plaintiffs have failed to offer any evidence of an official policy of Ada County or the Sheriff's Department, which would make them liable under Section 1983. Plaintiffs' claim for loss of consortium must also fail as a matter of law, as this claim is wholly contingent upon plaintiffs' success on the underlying tort claims. *Runcorn v. Shearer Lumber Prod., Inc.*, 107 Idaho 389, 394, 690 P.2d 324, 329 (1984).

III. ORDER

Based on the foregoing and the court being fully advised in the premises,

IT IS HEREBY ORDERED that plaintiffs' Motion for Partial Summary Judgment, should be and hereby is, DENIED in its entirety.

IT FURTHER ORDERED that defendants' Motion for Summary Judgment, should be and hereby is, GRANTED.

DATED this 20 day of November, 1990.

s/ Harold L. Ryan
HAROLD L. RYAN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

(Caption Omitted in Printing)

JUDGMENT

Based upon this court's Memorandum Opinion and Order dated November 20, 1990, and the court being fully advised in the premises,

IT IS ORDERED AND ADJUDGED that plaintiffs take nothing against the defendants, and that this action be dismissed.

DATED this 21 day of November, 1990.

/s/ Harold L. Ryan
HAROLD L. RYAN
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-35146

D.C. No. CV-88-1329-HLR

CHARLES K. ELDER; BEVERLY S. ELDER,
husband and wife,
Plaintiffs-Appellants,

v.

R. D. HOLLOWAY; OTHER UNKNOWN EMPLOYEES AND/OR AGENTS, individually and in their official capacity as police officers for the Ada County Sheriff's Office, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Idaho
Harold L. Ryan, District Judge, Presiding

Argued and Submitted
October 8, 1991—Seattle, Washington

Filed December 19, 1991

Before: J. Clifford Wallace, Chief Judge, Procter Hug, Jr. and Pamela Ann Rymer, Circuit Judges

Opinion by Judge Rymer

OPINION

RYMER, Circuit Judge:

This appeal raises an unusual question: whether a summary judgment on qualified immunity in favor of a law enforcement officer which was properly granted on the record presented to the district court, should nevertheless be reversed because there are legal authorities that plaintiff did not present to the district court or to us on appeal which suggest that, contrary to what the district court found, the law was clearly established at the time of the incident. Because the plaintiff bears the burden of proof on the issue, we affirm.

After receiving word that Charles Elder, who was wanted on Florida warrants and considered dangerous, was in town, officer R.D. Holloway and others in the Ada County Sheriff's Office made plans to arrest him outside his place of work. Elder and his borther William got wind of the officers' plans, however, left work early, and returned to William's house (where Elder was living, too). Holloway and a number of other officers set up surveillance at the house. When William tried to ride away on horseback, he was detained. Officers found out that Elder had access to weapons in the house. Eventually, Holloway and William made telephone contact with Elder, who meanwhile had suffered two epileptic seizures. Holloway advised him that if he was unable to walk out of the house, he should crawl. Elder walked out a few minutes later, but fell face down, hitting his head and sustaining severe injuries. This happened on April 27, 1987.

Elder's 42 U.S.C. § 1983 action claims these events violated his constitutional right not to be arrested in his home without a valid Idaho warrant. Holloway's motion for summary judgment on the ground of qualified im-

munity was granted because the court found no Idaho or Ninth Circuit law that addressed the issue of whether a valid Idaho warrant was necessary to make a "constructive entry" into a home to arrest an occupant.

As the trial judge's memorandum opinion and order notes, Elder cited two cases to the court, *State v. Holeman*, 103 Wash. 2d 426, 693 P.2d 89 (1985), and *Scroggins v. State*, 276 Ark. 177, 633 S.W.2d 33 (1982). Based on these cases and its reading of *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980), the district court concluded that the law was not clear on the issue of "constructive crossing of the threshold." Accordingly, it ruled in Holloway's favor on qualified immunity.

We have no difficulty with the district court's decision on the record it was presented. Neither case Elder relied upon clearly established whether an arrest takes place inside or outside the home, when the suspect is inside but is summoned outside by law enforcement officers who have surrounded the premises.

There was, however, Ninth Circuit authority, long in place, which is closely on point and could make a difference in the outcome of this case. In *United States v. Al-Azzawy*, 784 F.2d 890 (9th Cir. 1985), *cert. denied*, 476 U.S. 1144, 106 S. Ct. 2255, 90 L. Ed. 2d 700 (1986), police surrounded the suspect's house and, with weapons drawn, ordered him to leave. When he emerged, he was taken into custody. We held that, even though he had exited the house and was physically seized outside, he "was arrested inside his residence without a warrant." *Id.* at 893. In so holding, we reaffirmed the rule that " 'it is the location of the arrested person, and not the arresting agents, that determines whether an arrest occurs within a home.' " *Id.* (quoting *United States v. Johnson*, 626 F.2d 753, 757 (9th Cir. 1980), *aff'd on other grounds*, 457 U.S. 537, 102 S. Ct. 2579, 73 L. Ed. 2d 202 (1982)). The Sixth Circuit had also held to the same effect in *United States v. Morgan*, 743 F.2d 1158, 1166-67 (6th Cir. 1984), *cert. denied*, 471 U.S. 1061, 105 S. Ct. 2126, 85 L. Ed. 2d 490 (1985).[1] Thus, that principle was clearly established at the time of Elder's arrest.[2]

The problem, of course, is that none of these cases were called to the attention of the district court. The question, therefore, is whether we should now reverse. We conclude that we should not, for the following reasons.

First, we have said that a § 1983 plaintiff bears the burden of showing that the constitutional right purportedly violated was clearly established at the time of the official's conduct. *Baker v. Racansky*, 887 F.2d 183, 186 (9th Cir. 1989). Although the state of the law at the time the incident occurred is a question for the court, rather than a jury, to decide, in the unique context of qualified immunity it is akin to a question of fact. What the law was is inextricably intertwined with the merits of the issue, such that a court cannot properly resolve a police officer's motion for summary judgment without determining whether, on the one hand, the law was clearly established and, on the other, whether the law enforcement official would reasonably have known he was violating the plaintiff's constitutional rights by his conduct on

---

[1] The Eighth Circuit is now in accord, *see Duncan v. Storie*, 869 F.2d 1100 (8th Cir.), *cert. denied*, 493 U.S. 852, 110 S. Ct. 152, 107 L. Ed. 2d 110 (1989). However, *Duncan* was handed down after the incident at issue in this case. Therefore, it is not relevant on the question of Holloway's good faith belief, and Elder's reliance on it on appeal is inappropriate.

[2] *Al-Azzawy* went on to hold that exigent circumstances justified the warrantless arrest. 784 F.2d at 894. Holloway urges that no matter what, this renders the law uncertain. Given our disposition, it is not necessary to resolve this question.

the particular occasion. Unless the plaintiff presents legal authorities that bear on the point, he fails to carry his burden.

Second, it goes without repeating that we never consider *facts* not presented to the district court. *United States v. Elias*, 921 F.2d 870, 874 (9th Cir. 1990). By the same token, we normally do not consider *legal issues* not raised or ruled upon in the district court. Examples include those matters that can be urged by way of a Rule 12 motion that are waived unless made with the answer, *see, e.g.*, Fed. R. Civ. P. 12(h)(1) (defenses of lack of personal jurisdiction, improper venue, insufficiency of process, and insufficiency of service of process waived if omitted from pre-answer motion, if any, or answer); *Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir. 1986) (A "general appearance or responsive pleading by a defendant that fails to dispute personal jurisdiction will waive any defect in service or personal jurisdiction."), *amended on other grounds*, 807 F.2d 1514 (9th Cir.), *cert. denied*, 484 U.S. 870, 108 S. Ct. 198, 98 L. Ed. 2d 149 (1987); *Chilicky v. Schweiker*, 796 F.2d 1131, 1135-36 (9th Cir. 1986) (if party files pre-answer motion but fails to raise defense of lack of personal jurisdiction in that motion, defense is waived), *rev'd on other grounds*, 487 U.S. 412, 108 S. Ct. 2460, 101 L. Ed. 2d 370 (1988); issues that could have been joined by a motion for directed verdict, but cannot be pressed on appeal unless that motion is made, *see, e.g., Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1493 (9th Cir. 1986) (sufficiency of evidence not reviewable on appeal unless motion for directed verdict was made in trial court); *United States v. 33.5 Acres of Land*, 789 F.2d 1396, 1400 (9th Cir. 1986) (same, but noting limited exception for plain error resulting in manifest miscarriage of justice); and errors in instructions that are waived unless an objection is timely made or instructions reflecting contrary law are submitted before the jury goes out, *see e.g.*, Fed. R. Civ.

P. 51 (no party can challenge jury instructions on appeal unless objection made before jury retires); *Hammer v. Gross*, 932 F.2d 842, 847-48 (9th Cir.) (en banc) (party cannot challenge jury instructions on appeal if not objected to in district court prior to jury retiring; there is no plain error exception to this rule), *cert. denied*, 60 U.S.L.W. 3154 (Dec. 2, 1991). Furthermore, the relevant record on review of summary judgments is the record as it existed at the time the motion was considered. *Harkins Amusement Enter., Inc. v. General Cinema Corp.*, 850 F.2d 477, 482 (9th Cir. 1988), *cert. denied*, 488 U.S. 1019, 109 S. Ct. 817, 102 L. Ed. 2d 806 (1989). We see no meaningful distinction between these procedures and this one.

Third, for us to reverse on account of law that could and should have been known to counsel at the time the summary judgment motion was under consideration would violate the spirit of the first rule of the Federal Rules of Civil Procedure. Rule 1 mandates that the rules "be construed to secure the just, speedy, and inexpensive determination of every action." This includes Rule 56 on summary judgments. In this case, a summary judgment was entered that is arguably erroneous because the person with the burden to do so, failed to find or produce relevant Ninth Circuit authority. Had he done so at the right time and in the right forum, the adverse judgment might have been avoided. So, too, would this appeal. In these circumstances, failing to hold Elder to the case he chose to present would fly in the face of Rule 1.

Fourth, given the hybrid nature of the issue, and the fact that the plaintiff has the burden of showing that the law was clearly established, for us to step in now would have the effect of putting the court on counsel's legal staff. We have great concern that this does not comport with our overriding obligation to be fair and impartial to all sides. More significantly, to reverse because of legal authority not called to the attention of the district court,

when the state of the law is the heart of the qualified immunity issue on summary judgment, would necessarily mean that we expect the district court to research independently the applicable law whenever qualified immunity is at issue. While to do so is commendable and encouraged, we are reluctant to require it at the cost of reversible error, at least when the error is not so obvious or fundamental as to result in a denial of due process. To impose this burden on a district judge would put him or her back in the business of practicing law, and to that extent implicates the court's impartiality. *Cf. Jacobsen v. Filler*, 790 F.2d 1362, 1365 n.7 (9th Cir. 1986). It would also shift to the court the burden we have put on the plaintiff. That we are bound not to do. *Pratt v. McCarthy*, 850 F.2d 590, 593 (9th Cir. 1988) (only en banc court has power to reject circuit precedent).

Finally, in this case we cannot say that injustice has occurred. Neither counsel nor the court found *Al-Azzawy*. We are hard pressed to conclude that, given that failure, the law was sufficiently clear that a reasonable law enforcement officer in Holloway's shoes would understand that what he was doing violated a constitutional right.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

(Caption Omitted in Printing)

Appeal from the United States District Court
for the District of Idaho
Harold L. Ryan, District Judge, Presiding

Argued and Submitted October 8, 1991
Seattle, Washington

Filed December 19, 1991
Amended: September 17, 1992

Before: WALLACE, Chief Judge, HUG and RYMER, Circuit Judges

Opinion by Judge Rymer

AMENDED OPINION

RYMER, Circuit Judge:

This is a 42 U.S.C. § 1983 action in which Charles Elder claims that his constitutional right not to be arrested inside his home without a valid Idaho warrant was violated when law enforcement officers, after setting up armed surveillance, called him to come outside the house and arrested him on the porch. In opposition to the officers' motion for summary judgment on qualified immunity, Elder proffered three out-of-state cases to show that the law was clearly established that a warrant was required to make a "constructive entry" into the house. The district court found on the basis of those cases that

the law was not clear, and ruled in favor of the officers. We agree with the district court's analysis. There is, however, Ninth Circuit authority which was not called to the attention of the district court that might have alerted a reasonable officer to the constitutional implications of putting a suspect under arrest after he had come outside his house pursuant to an order to exit.

Elder's appeal thus raises a narrow question: whether a summary judgment on qualified immunity in favor of a law enforcement officer which was properly granted on the record presented to the district court, should nevertheless be reversed because there are legal authorities that plaintiff did not present to the district court or to us on appeal which suggest that, contrary to what the district court found, the law was clearly established at the time of the incident. Because the plaintiff in a § 1983 action confronted with a request for judgment on grounds of qualified immunity bears the burden of proving that the constitutional right allegedly violated was clearly established at the time of the incident, we affirm.

I

After receiving word that Charles Elder, who was wanted on Florida warrants and considered dangerous, was in town, officer R.D. Holloway and others in the Ada County Sheriff's Office made plans to arrest him outside his place of work. Elder and his brother William got wind of the officers' plans, however, left work early, and returned to William's house (where Elder was living, too). Holloway and a number of other officers set up surveillance at the house. When William tried to ride away on horseback, he was detained. Officers found out that Elder had access to weapons in the house. Eventually, Holloway and William made telephone contact with Elder, who meanwhile had suffered two epileptic seizures. Holloway advised him that if he was unable to walk out of the house, he should crawl. Elder walked out a few

minutes later, but fell face down, hitting his head and sustaining severe injuries. This happened on April 27, 1987.

Elder's complaint alleges that these events violated his constitutional right not to be arrested in his home without a valid Idaho warrant. Both parties moved for summary judgment.

On the issue of qualified immunity, Elder argued in the district court that the law was clearly established that an Idaho warrant was required to make a "constructive entry" over the threshold. He proffered *Payton v. New York*, 445 U.S. 573 (1980), for the proposition that, as of April 27, 1987 (when the incident occurred), it was clearly established that the Fourth Amendment prohibited a warrantless entry into a suspect's home to make a routine felony arrest absent consent or exigent circumstances. No one disputed this general principle, and the district court correctly recognized that the law, where there is an actual entry into the home, is clearly established.

Nor did the parties disagree about "the level of generality at which the relevant 'legal rule' is to be identified." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). They disagreed whether, in 1987, there was binding precedent which clearly established when an arrest "constructively" takes place inside a house if no law enforcement officer steps inside the door and the suspect is physically placed under arrest outside the door. Elder proffered three cases in support of his claim that the law clearly established that there was a "constructive entry": *State v. Holeman*, 693 P.2d 89 (Wash. 1985), *State v. Morse*, 480 A.2d 183 (N.H. 1984), and *Scroggins v. State*, 633 S.W.2d 33 (Ark. 1982). The district court reviewed the cases identified by Elder and found there was no controlling Idaho or Ninth Circuit case law on the issue of "constructive entry." That being so, it concluded that the officers could not have violated Elder's clearly estab-

lished rights when the law was not clear as to when a constructive entry occurs, and the officers could reasonably have believed they could effectuate an arrest outside the door without violating any clearly established right.

On appeal, Elder argues that the law was clearly established that the officers were required to have an Idaho warrant prior to ordering him out of the house, because the facts constitute a constructive crossing of the threshold. Elder identifies the same cases as showing that the law was clearly established that the arrest constructively occurred inside rather than outside his house, as he did in the district court—*Holeman*, *Morse*, and *Scroggins*—and also relies on *Duncan v. Storie*, 869 F.2d 1100 (8th Cir.), *cert. denied*, 493 U.S. 852 (1989). *Duncan* post-dates the incident and is therefore not material; it does, however, cite to *United States v. Al-Azzawy*, 784 F.2d 890 (9th Cir. 1985), *cert. denied*, 476 U.S. 1144 (1986).

In *Al-Azzawy*, police surrounded the suspect's house and, with weapons drawn, ordered him to leave. When he emerged, he was taken into custody. We held that exigent circumstances justified the warrantless arrest. Before reaching this issue, however, we first addressed the question whether the arrest had taken place inside the suspect's house; if not, the issue of exigent circumstances would have been moot. We determined that, even though the suspect had exited the house and was physically seized outside, he was in fact "arrested inside his residence without a warrant." *Id.* at 893. In so concluding, we reaffirmed the rule that "it is the location of the arrested person, and not the arresting agents, that determines whether an arrest occurs within a home." *Id.* (quoting *United States v. Johnson*, 626 F.2d 753, 757 (9th Cir. 1980), *aff'd on other grounds*, 457 U.S. 537 (1982)). Since we reversed the district court "on the grounds that the warrantless arrest and search were justified by exigent circumstances," *id.* at 895, our conclusion as to where

the arrest took place may be regarded as dicta, unnecessary to this result.

We have no difficulty with the district court's decision on the record it was presented. No case Elder identified clearly established whether an arrest takes place inside or outside the home, when the suspect is inside but is summoned outside by law enforcement officers who have surrounded the premises.

We are, however, troubled by the possibility that *Al-Azzawy's* initial conclusion might have alerted a reasonable officer to the constitutional implications of putting a suspect under arrest after he had come outside his house pursuant to an order to exit. Despite the opportunity at oral argument and subsequent briefing, neither party has shed much light on whether *Al-Azzawy* requires us to reverse despite Elder's failure to rely on it.[1]

"[T]he determination of whether [a] right was so 'clearly established' as to alert a reasonable officer to its constitutional parameters" presents a "pure question[] of law." *Romero v. Kitsap County*, 931 F.2d 624, 627-28 (9th Cir. 1991); *see also Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (referring to the "essentially legal question" of qualified good faith immunity). At the same time, "[t]he plaintiff bears the burden of proof that the right allegedly violated was clearly established at the time of the alleged misconduct. If plaintiff carries this burden, then the officers must prove that their conduct was reasonable even though it might have violated constitutional standards." *Romero*, 931 F.2d at 627 (citations

[1] Elder's view is that "all cases are distinguishable." We assume he takes this position because of *Al-Azzawy*'s ultimate holding, that exigent circumstances justified the officers' conduct in that case. That holding ultimately cuts against Elder in this action, and may explain why he did not proffer *Al-Azzawy* in opposition to Holloway's motion.

omitted); *Maraziti v. First Interstate Bank*, 953 F.2d 520, 523 (9th Cir. 1992).

II

In § 1983 actions where qualified immunity is at issue, it has been the rule that the plaintiff bears the burden of showing that the fact-specific constitutional right allegedly violated was clearly established at the time of the incident since *Davis v. Scherer*, 468 U.S. 183 (1984), and *Bothke v. Fluor Eng'rs and Constructors, Inc.*, 739 F.2d 484 (9th Cir. 1984), following *Davis* in this circuit. In *Davis*, the Supreme Court held that "[a] plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue." 468 U.S. at 197.

Our court has reiterated the burden of proof rule a dozen times since *Bothke*,[2] but until now we have not been called upon to reconcile it with the equally well settled rule that the determination of whether the constitutional right was clearly established presents an issue of law. We believe that neither rule can be ignored, and hold that the plaintiff's burden in responding to a request for judgment based on qualified immunity is to identify the universe of statutory or decisional law from which the court can determine whether the right allegedly violated

---

[2] *Maraziti*, 953 F.2d at 523; *Romero*, 931 F.2d at 627; *Bryant v. United States Treasury Dep't*, 903 F.2d 717 (9th Cir. 1990), *rev'd*, *Hunter v. Bryant*, 112 S. Ct. 534 (1991); *DiMartini v. Ferrin*, 889 F.2d 922, 927-29 (9th Cir. 1989), *amended on other grounds*, 906 F.2d 465 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2796 (1991); *Baker v. Racansky*, 887 F.2d 183, 186 (9th Cir. 1989); *Tribble v. Gardner*, 860 F.2d 321 (9th Cir. 1988), *cert. denied*, 490 U.S. 1075 (1989); *Bothke v. Fluor Eng'rs & Constructors, Inc.*, 834 F.2d 804, 808 (9th Cir. 1987); *Tomer v. Gates*, 811 F.2d 1240 (9th Cir. 1987); *Backlund v. Barnhart*, 778 F.2d 1386, 1389-90 (9th Cir. 1985); *Fendler v. United States Parole Comm'n*, 774 F.2d 975, 980 (9th Cir. 1985).

was clearly established. The district court's determination of whether that universe of authority clearly established the law so as to alert a reasonable officer to the constitutional parameters of the right allegedly violated is an issue of law, as to which our review is de novo.

A

Under the rule of *Davis v. Scherer*, a defendant is presumed to be immune from damages unless the plaintiff shows that the right allegedly violated was clearly established at the time of the conduct at issue. 468 U.S. at 197. Thus, Holloway had qualified immunity unless Elder overcame it by "showing" that the right not to have his house constructively entered was clearly established (or that there are triable issues of fact that must be resolved before a determination can be made whether, as to those specific facts, the law was clearly established). If the plaintiff is not expected to make any "showing" except as to what happened factually, leaving it to the court to come up with the relevant universe of authority from which to find whether the law was clearly established, the *Davis* rule would be flipped on its head.

Expecting the plaintiff to identify all potentially relevant authorities that bear on the court's determination of whether the law was clearly established comports with the Supreme Court's recent approach to qualified immunity. From *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), through *Davis* and *Anderson*, 483 U.S. at 635, to *Hunter v. Bryant*, 112 S. Ct. 534 (1991), the Court has made qualified immunity the presumptive norm, which can be overcome if the plaintiff shows that the contours of a fact-specific right are so clear that a reasonable official would understand that what he is doing violates that right. Requiring the plaintiff to identify the universe of authority that is relevant to the fact-specific right allegedly violated follows naturally from this direction.

While most of our qualified immunity opinions make no mention of who came up with the relevant authority, we have in practice looked to the cases identified by the plaintiff. On several occasions, after stating that the plaintiff bears the burden of proof, we have explicitly indicated which cases the plaintiff identifies, and have discussed only those cases in resolving the appeal. *See, e.g., Romero*, 931 F.2d at 629 (plaintiffs maintain that despite federal law, decisions of state courts demonstrate law was clearly established; they cite particular case, which court finds did not adjudicate right at issue); *Baker v. Racansky*, 887 F.2d 183, 188 (9th Cir. 1989) (plaintiffs rely on four cases which they assert clearly established right to hearing or warrant); *Backlund v. Barnhart*, 778 F.2d 1386, 1389 (9th Cir. 1985) (plaintiffs must show they had clearly established right to exercise religious beliefs about punishment on foster care child; "[t]hey fail to cite any pertinent authority on this issue").[3] At least two other circuits have indicated that a plaintiff, in order to carry his burden of proving that the law was clearly established (and thus to avoid summary judgment in favor of the defendant), must specifically identify the clearly established law. *See Pueblo Neighborhood Health Ctrs., Inc. v. Losavio*, 847 F.2d 642, 646 (10th Cir. 1988) (burden is on plaintiff to identify clearly established law; if plaintiff fails to carry

[3] We simply make explicit in this case what was implicit in *Backlund*, where we said:

> We do not hold that Section 1983 plaintiffs must always find a case on point in their favor to show that their rights were clearly established. Certainly they need not always produce binding precedent. *Capoeman v. Reed*, 754 F.2d 1512, 1514-15 (9th Cir. 1985). There may be cases of conduct so egregious that any reasonable person would have recognized a constitutional violation. The Backlunds have failed to show that this was such a case. Indeed, they have failed to show a violation of any constitutional right, clearly established or not.

Backlund, 778 F.2d at 1390 (footnote omitted).

this burden, defendant prevails); *see also, e.g., Upton v. Thompson*, 930 F.2d 1209, 1212 (7th Cir. 1991) ("To prove the presence of a clearly established constitutional right, the plaintiff must point to 'closely analogous cases' decided prior to the defendants' challenged actions."), *cert. denied*, 112 S. Ct. 1262 (1992).

We therefore hold that in opposing an official's request for judgment based on qualified immunity, the plaintiff's burden includes identifying the universe of relevant statutory or decisional law from which the court can determine whether the right allegedly violated was clearly established. Imposing the burden of proving that the right was clearly established means that a § 1983 plaintiff, confronted with a challenge on grounds of qualified immunity, must show that the particular facts of his case support a claim of clearly established right, and he loses if he does not come forward with statutory or decisional law on which the court can find that the constitutional right allegedly violated was clearly established. *See Backlund*, 778 F.2d at 1389.

B

Although qualified immunity is an "essentially legal question," *Mitchell v. Forsyth*, 472 U.S. at 526, neither the trial court nor the court of appeals decides what the law *is*, but instead the question is whether the law with respect to a fact-specific set of circumstances *was* "so 'clearly established' as to alert a reasonable officer to its constitutional parameters." *Romero*, 931 F.2d at 627. Whether a right was clearly established requires consideration of legal facts, that is, it requires a balancing by the judge of such things as whether any court has held that a particular constitutional right exists or that conduct similar to that of the officers in the case at hand violates that constitutional right, the number of times the particular right has been recognized and under what circumstances, whether the alleged constitutional right was ap-

parent from the cases even if it had not been expressly recognized, how clear the holdings were, which courts made the decisions, and whether in light of those decisions, a reasonable officer could have believed his conduct to be lawful. The nature of this determination, in light of the burden of proof imposed on the plaintiff to show that the law was clearly established, distinguishes the legal inquiry in qualified immunity cases from both the ordinary civil case and others where constitutional issues are presented. These differences lead us to conclude that appellate review of the resulting determination is appropriately limited to whether the district court erred in concluding that the plaintiff failed to meet his burden on the record of authorities the plaintiff produced.

Whereas normally, a district court has to get an issue of law right, and it does not matter which party presents which authorities (or whether the court uncovers them itself) because the court's decision on a purely legal issue is either right or wrong "as a matter of law," imposing the burden of proving that the law was clearly established on the plaintiff—as we do in the unique context of qualified immunity—is without meaning unless the plaintiff has an obligation to produce the legal facts from which the court can determine what the state of the law was at the point of time in the past when the incident occurred. In the ordinary case, the party asserting a claim or defense may have the practical burden of convincing a judge that the law favors his position in the present, but that differs from a legal burden of showing how clearly the law was established at a given point in the past. There may, indeed, be no law that bears on the issue at all, but in the ordinary case that does not mean the proponent will lose. It does, however, mean that the plaintiff *must* lose in the context of qualified immunity unless the officers' conduct was "so egregious that any reasonable person would have recognized a constitutional violation." *Backlund*, 778 F.2d at 1390.

Similarly, in other cases where constitutional issues are adjudicated, courts declare what the law is (no matter how fuzzy the precedents), but that is a different obligation from determining what the law with respect to an alleged constitutional right was, and how clear it was. When, for example, the issue on a motion to suppress is whether police officers violated a suspect's constitutional rights by coercing him into a confession, there is no question that the district court must divine and apply the law correctly, no matter what cases are cited by the parties. The court of appeals has a correlative obligation to correct error when it occurs. But that is not the task when addressing whether government officials are entitled to qualified immunity from damages. The difference has long been recognized, for, as we stated in *Backlund*, "qualified immunity shields an official from liability for damages only, not from a finding that he violated constitutional rights." 778 F.2d at 1389 n.3 (citing *Davis*, 468 U.S. at 192-93).

Courts of appeals do not invariably reverse in a civil case whenever a district court gets the law wrong on an issue of law, even if the consequence is that the result would otherwise be different. We do when the legal question is whether a claim for relief is stated, or whether a party is entitled to judgment as a matter of law. We do not when the question is whether instructions accurately state the law, and the party claiming error did not object, *see, e.g., Hammer v. Gross*, 932 F.2d 842, 847-48 (9th Cir.) (en banc), *cert. denied*, 112 S. Ct. 582 (1991); *Benigni v. City of Hemet*, 879 F.2d 473, 477 (9th Cir. 1988); *Martinelli v. City of Beaumont*, 820 F.2d 1491, 1493-94 (9th Cir. 1987), or invited the error about which he complains on appeal. *See, e.g., Benigni*, 879 F.2d at 477.[4]

---

[4] We also, of course, do not consider legal issues not raised or ruled upon in the district court. Examples include those matters

The determination of whether a specific right was clearly established is closer to the latter kind of "issue of law" than the former. In an adversary system where the plaintiff has the burden of showing that a specific right was clearly established in the law, if the court "gets it wrong" because the universe of cases proffered by the plaintiff in support of his claim that the right was clearly established turns out to be less than all of the potentially relevant legal facts, the plaintiff has invited whatever error occurs.

Defining the plaintiff's burden to include identification of relevant authority in the unique context of qualified immunity should have no unsettling effect on the orderly

---

that can be urged by way of a Rule 12 motion that are waived unless made with the answer, *see, e.g.*, Fed. R. Civ. P. 12(h)(1) (defenses of lack of personal jurisdiction, improper venue, insufficiency of process, and insufficiency of service of process waived if omitted from pre-answer motion, if any, or answer); *Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir. 1986) (A "general appearance or responsive pleading by a defendant that fails to dispute personal jurisdiction will waive any defect in service or personal jurisdiction."), *amended on other grounds*, 807 F.2d 1514 (9th Cir.), *cert. denied*, 484 U.S. 870 (1987); *Chilicky v. Schweiker*, 796 F.2d 1131, 1135-36 (9th Cir. 1986) (if party files pre-answer motion but fails to raise defense of lack of personal jurisdiction in that motion, defense is waived); *rev'd on other grounds*, 487 U.S. 412 (1988); and issues that could have been joined by a motion for directed verdict, but cannot be pressed on appeal unless that motion is made, *see, e.g., Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1493 (9th Cir. 1986) (sufficiency of evidence not reviewable on appeal unless motion for directed verdict was made in trial court); *United States v. 33.5 Acres of Land*, 789 F.2d 1396, 1400 (9th Cir. 1986) (same, but noting limited exception for plain error resulting in manifest miscarriage of justice). We never consider *facts* not presented to the district court. *United States v. Elias*, 921 F.2d 870, 874 (9th Cir. 1990). And, the relevant record on review of summary judgments is the record as it existed at the time the motion was considered. *Harkins Amusement Enters., Inc. v. General Cinema Corp.*, 850 F.2d 477, 482 (9th Cir. 1988), *cert. denied*, 488 U.S. 1019 (1989).

development of constitutional law. So far as the particular case is concerned, the district court may still find that the plaintiff's constitutional rights were violated even though at the time of the incident, the right was not so clearly established that an official should have to respond in damages for his conduct. *Backlund*, 778 F.2d at 1389 n.3 (citing *Davis*, 468 U.S. at 192-93). By the same token, an appellate decision that the district court did not err on the record before it in determining that a right was not clearly established based on the universe of authorities produced by the plaintiff is precedential only on whether the specific right allegedly violated was clearly established at a particular point in time, *see Baker*, 887 F.2d at 187 (post-incident cases which considered whether law governing child abuse investigations was clearly established in 1986, at time of incident in question, are relevant persuasive authority on this issue); it has no precedential effect on whether such a constitutional right exists or was violated, or as to a subsequent case where the record is different.

Accordingly, we shall review the district court's determination that a § 1983 plaintiff has (or has not) met the burden of showing that the law was clearly established for purposes of qualified immunity for whether its conclusion was correct based on the legal facts identified by plaintiff.

III

Our holding does not mean that it is inappropriate for a district court to come up with relevant law on its own, anymore than it is inappropriate for a district judge to ask questions and thereby elicit evidence on his own. However, the district court has no obligation to do either in the unique context of qualified immunity. Where the plaintiff bears the burden of proof that the law was clearly established, as the plaintiff does in overcoming a request for judgment on the ground of qualified immunity, and

based on the record adduced fails to meet it, we hold only that the district court does not commit reversible error by failing to fill in the holes.

We are satisfied that no injustice results to Elder. First, the unproffered authority, *Al-Azzawy*, is not entirely advantageous. Because our ultimate holding in that case was expressly grounded on the conclusion that exigent circumstances justified the suspect's arrest and the subsequent warrantless search, 784 F.2d at 895, our initial conclusion that the arrest had taken place "inside" the house was unnecessary dicta. Given our adversary system, we are unwilling to say that Elder should be stuck with our take on a case that his counsel thinks is distinguishable, but rather believe that when the plaintiff has the burden of adducing the legal facts necessary to prove that the law was clearly established, the record upon which that determination is made is his call rather than ours. Second, assuming that Elder's failure to proffer *Al-Azzawy* was inadvertent, and the district judge did not find it either, we are hard-pressed to say that the law was so clearly established that a reasonable law enforcement officer in Holloway's shoes would understand that what he was doing violated a constitutional right. *See Ward v. County of San Diego*, 791 F.2d 1329, 1332 (9th Cir. 1986) (the court does not "require of most government officials the kind of legal scholarship normally associated with law professors and academicians"), *cert. denied*, 483 U.S. 1020 (1987).

For these reasons we conclude that the plaintiff in a § 1983 action, who bears the burden of showing that the constitutional right allegedly violated was clearly established at the time of the alleged misconduct, must identify the body of law which proves that the right was so clearly established that a reasonable officer would be alerted to its constitutional parameters. If the universe of statutory or decisional law proffered by the plaintiff does not show

that the right allegedly violated was clearly established at the time of the incident, the district court does not commit reversible error by considering only the legal facts presented and determining, correctly, that based on those legal facts the plaintiff has not shown that the contours of the right were clear.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

(Caption Omitted in Printing)

Filed January 27, 1993

Before: J. Clifford Wallace, Chief Judge, Procter Hug, Jr. and Pamela Ann Rymer, Circuit Judges.

Dissents by Judges Kozinski and Reinhardt

ORDER AND DISSENTS

ORDER

The panel has voted to deny appellants' petition for rehearing and to reject the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

Judges Reinhardt and Kozinski dissent from the failure of the court to rehear the case en banc.

DISSENTS

KOZINSKI, Circuit Judge, with whom Circuit Judges PREGERSON, NORRIS, REINHARDT and TROTT join, dissenting from the order rejecting the suggestion for rehearing en banc.

It is not every day that one witnesses the birth of a totally new legal doctrine. And with good reason. Established legal principles, honed over decades—sometimes centuries—generally have much experience and wisdom behind them. Monumental change should be made only for compelling reasons and after careful consideration of all foreseeable consequences.

Despite the opinion's modest language, the panel here has taken quite an extraordinary step. Simply stated, the panel has held that in raising a pure question of law a party may rely on appeal only on those authorities which it cited to the district court. A court of appeals, in turn, must ignore its own (and the Supreme Court's) controlling case law if it was not cited to the court below. The panel reaches this result by adding a new term to the argot of jurisprudence: "legal facts." The term is as self-contradictory and nonsensical as the doctrine it supports. Because we can ill afford to maintain this precedent as the law of this circuit, I respectfully dissent from the court's refusal to take this case en banc.

I

The underlying facts are simple: Defendants, all police officers, surrounded Charles Elder's house and ordered him to come out. He did come out and was promptly arrested in front of his house. Elder sued under 42 U.S.C. § 1983, alleging the police violated his Fourth Amendment right to not be arrested in his home without a valid warrant. Defendants moved for summary judgment claiming qualified immunity. To overcome the immunity defense, plaintiff cited a variety of cases to demonstrate that the specific Fourth Amendment right he sued on was clearly established. None of the cases was directly on point, and the district court granted defendants' motion.

Unknown to the parties and the district court was *United States v. Al-Azzawy*, 784 F.2d 890 (9th Cir. 1985), *cert. denied*, 476 U.S. 1144 (1986), which showed that the "principle [on which plaintiff rested his case] was clearly established at the time of Elder's arrest." *Elder v. Holloway*, 951 F.2d 1112, 1114 (9th Cir. 1991) (previous version of this opinion).[1]

Whether the right was clearly established at the time of the incident, the majority recognizes, is a "pure question of law." *Elder v. Holloway*, 975 F.2d 1388, 1392 (9th Cir. 1992) (quoting *Romero v. Kitsap County*, 931 F.2d 624, 627-28 (9th Cir. 1991)). It is, of course, well understood that questions of law are reviewed by us de novo, giving no deference to the ruling of the district court. *Pierce v. Underwood*, 487 U.S. 552, 557 (1988); *Bose Corp. v. Consumers Union*, 466 U.S. 485, 501 (1984); *United States v. Silverman*, 861 F.2d 571, 576 (9th Cir. 1988) ("Under the de novo standard of review, we do not defer to the lower court's ruling but freely consider the matter anew, as if no decision had been rendered below.").

The reason for de novo review of legal questions is obvious enough: We are in a better position than the

[1] The panel omits this statement from the more recent version of its opinion, but it does nothing to controvert it. This is quite understandable. *Al-Azzawy* is on all fours with this case; our statement that "it is the locati n of the arrested person, and not the arresting agents, that determines whether an arrest occurs within a home," *Al-Azzawy*, 784 F.2d at 893, was clear, and it applies directly to the claim of qualified immunity raised by the defendants here. Its applicability is undiminished by the panel's suggestion that it "may be regarded as dicta." *Elder*, 975 F.2d at 1391. In fact, the majority's reliance on its newly invented doctrine can only be understood as recognizing that *Al-Azzawy* does make a difference. After all, if *Al-Azzawy* did not change the legal landscape enough to defeat a claim of qualified immunity, it would have been far simpler to dispose of the case on that basis.

district court to resolve legal questions. We "are not encumbered, as are trial judges, by the vital, but time-consuming, process of hearing evidence." *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984). We see many legal issues repeatedly, giving us a greater familiarity with the subject matter. We also have the advantage of sitting in panels where we can deliberate about legal issues. Even the en banc process (which failed us here) lets us talk to each other about issues that the district court must decide alone.

When it comes to facts, however, the district court has an institutional advantage. It can observe witnesses, hear their testimony, and see and touch the physical evidence. Our review of questions of fact is therefore very limited. This leaves resolving questions of law—if necessary, by writing opinions that refine, clarify and develop existing legal doctrines—as our principal mission.

Given these defined areas of responsibility, the panel's holding is a true anomaly. According to the panel, because the plaintiff in a qualified immunity case has the burden of showing the defendant violated clearly established law, the relevant law on that point becomes a fact —a legal fact—which the plaintiff must prove up in the district court. But there is nothing about qualified immunity that requires or permits treating the law as fact. Facts by their nature are case specific. They must be proven through witnesses or documentary evidence; the proof is subject to skeptical review by the trier of fact who may not accept all that is put in front of him. Law is external to any particular case; it is not subject to evaluation by the trier of fact; it can be raised for the first time on appeal because it need not—cannot—be established by use of percipient witnesses or documentary evidence.

Every issue in every case turns on both fact and law; facts outside a legal framework are as irrelevant as abstract legal principles. When we say, for example, that the plaintiff must prove certain facts at trial, we mean he must first establish what the law is and then conform his proof to the applicable legal standard.[2] If the plaintiff misunderstands the law, he may well prove up the wrong set of facts. The failure to get the law right in such a case may then be fatal, not because law is fact, but because a party can't supplement the record on appeal once it discovers that it missed the legal target in the district court. It is quite another matter to say, as the panel does, that even though the facts proved in the district court would be sufficient to defeat a claim of qualified immunity under the existing law, the party might lose because it forgot to cite the correct case below.

The panel's misguided ruling shifts the focus of the qualified immunity inquiry from the clarity of the law actually violated by the defendants to the clarity of the law as presented by the plaintiff to the district court. Thus, under the panel's opinion, a government official's conduct is not evaluated under the standard announced by the Supreme Court—*the clearly established law* at the time the official acted—but on the basis of what case law the plaintiff's lawyer managed to dredge up and cite below. This is a drastic departure from the way questions of law are decided and reviewed in our system, where the adversaries present their versions of the law to the court and the court renders its determination after making an independent assessment of what the law is.

---

[2] If it turns out that the plaintiff misunderstands the law and, as a consequence, misleads the district court, we may well limit the scope of our judicial review. *See* pp. 592-94 *infra*. But we most assuredly do not say that the plaintiff has failed to meet his burden of proof because he did not cite a particular case to the district court; we certainly do not say that the appeal *must* be determined as if no other law existed than what was cited to the district court.

II

We are told that the blind man, when handed the elephant's tail, concluded that the creature looked like a rope. So does the panel err in building a whole theory of qualified immunity law on a paragraph dangling at the end of *Davis v. Scherer*, 468 U.S. 183 (1984). There the Court stated: "A plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only *by showing* that those rights were clearly established at the time of the conduct at issue." *Id.* at 197 (emphasis added). The panel reads the phrase "by showing" as setting a requirement that the clearly established law be proved as one typically proves fact—the way one would show that the light was red or that the banana peel was dark and gritty. But that is not a plausible reading of the Supreme Court's language. Because the Court has elsewhere made it clear that whether a right is clearly established is a question of law, the term "showing" must be construed as it applies to legal issues. The way a party demonstrates (or shows) that it should prevail in its legal argument is by citation and argument (which are judged only after a court has made an independent examination of the law), not by testimony and documentary proof.

Had the Court meant to adopt the rule that legal issues in qualified immunity cases are to be proved as facts, it would surely have used clearer language to explain what it was doing. It would not have adopted a major change like this merely by using the word "showing" and then hoping the lower courts would notice its word choice and make the connection—a connection no court actually made for eight years, until this panel suddenly perceived it. The Court would have also provided some rationale or explanation for adopting such a startling new rule. It certainly would not have adopted it without any discussion at all.

A. To understand the significance of the phrase on which the panel relies we must consider it in the context of both the entire *Davis* opinion and the legal backdrop against which it was placed. I start by noting that *Davis* never purported to alter the objective test for qualified immunity first announced in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). *Davis* applied the test unchanged, quoting it in full before it went through its qualified immunity analysis. *See Davis*, 468 U.S. at 191 (quoting *Harlow*, 457 U.S. at 818). This express restatement of *Harlow* shows that the concluding paragraph in *Davis*—a brief epilogue restating the qualified immunity test—meant simply to reassert *Harlow*, not alter it.[3]

Harlow held that government officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818. This "qualified immunity defense depends upon the 'objective reasonableness of [the defendant official's] conduct as measured by reference to clearly established law.' No other circumstances are relevant . . . ." *Davis*, 468 U.S. at 191 (citation omitted) (quoting *Harlow*, 457 U.S. at 818). Two aspects of the *Harlow* test call into question the panel's reading of *Davis*.

First, *Harlow* says nothing about the plaintiff having to prove up the law; in fact, it clearly intends that the court make an independent determination of the law: "On summary judgment, the *judge appropriately may determine*, not only the currently applicable law, but *whether the law was clearly established* at the time an action occurred." 457 U.S. at 818 (emphasis added). Thus, *Harlow* gave the court the responsibility to determine whether the law was clearly established. Neither

[3] In fact, *Davis* clarified *Harlow*; I take that up below. *See* pp. 586-87 *infra*.

Harlow nor *Davis* ever indicated that the plaintiff is obligated to prove up the law or that he waives any authorities not presented to the district court.

Second, the panel's rule is inconsistent with the rationale underlying the *Harlow* test. *Harlow* shifted the inquiry in qualified immunity cases from the subjective good faith of the government officials to the objective reasonableness of their conduct in light of clearly established law. *See id.* at 816-17. The Court settled on this objective test because "[t]he public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts." *Id.* at 819. The line *Harlow* drew was clear: "Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action." *Id.* at 819. Essential to this inquiry is that the official's conduct be judged against an objective standard—the law as it actually was, not as the official thought it was, or as the plaintiff proves it to be. *Harlow* doesn't say that "officials should be made to hesitate" when plaintiff can cite a case that says they should. Rather, the deterrence is supposed to operate whenever officials *in fact* transgress the actual clear boundaries of the law. *Davis* did nothing to move the inquiry off this fixed reference point.

In misreading *Davis*, the panel bypasses a far more natural interpretation of the relevant language—an interpretation based on the analysis in the body of the opinion. The precise question faced in *Davis*—something the panel never mentions—was whether an immunity defense could be defeated on the ground that the official violated *state* law. The Court answered this question in the negative, but it didn't stop there. *Davis* went on to hold that the violation of clearly established law relevant to the im-

munity determination must be the same violation as that on which the plaintiff rests his section 1983 claim. In other words, a plaintiff suing for violation of a specific Fourth Amendment right may only defeat the immunity claim if that very Fourth Amendment right was the clearly established one.

With this holding in mind, the meaning of the passage that confuses the panel becomes clear. Consider again the language: "A plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that *those rights* were clearly established at the time of the conduct at issue." 468 U.S. at 197 (emphasis added). The Court is merely restating its holding by emphasizing that to defeat a qualified immunity claim there must be an identity between the sued-on right and the clearly established right. The language was meant to prevent future plaintiffs from trying, as Scherer did, to sue on one right and to overcome the immunity by showing that some other rights were clearly established. This was the whole point of *Davis*, and the language the panel relies on here merely summarizes this ruling. It is normal practice to restate holdings in conclusions; it is far from normal for a conclusion to make a substantive legal change that is not even considered in the body of the opinion.

B. That *Davis* was not the watershed opinion the panel here reads it to be is evident from the Supreme Court's subsequent qualified immunity decisions. None of these decisions even hint at a requirement that the plaintiff must prove up the law by pleading legal facts. To the contrary, the Court has continued to draw clear distinctions between questions of law and questions of fact.

In *Mitchell v. Forsyth*, 472 U.S. 511, 524-30 (1985), the Court dissected a qualified immunity claim to determine whether a denial of immunity was an appealable order under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The Court considered the nature of an immunity claim in applying the *Cohen* requirement that a claim of right must be "separable from, and collateral to, rights asserted" in the underlying action in order to be appealable in an interlocutory appeal. 472 U.S. at 527. In holding that an immunity determination was a separate right, the Supreme Court explained the role of an appellate court in reviewing a qualified immunity claim:

> An appellate court reviewing the denial of defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even decide whether the plaintiff's allegations actually state a claim. *All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions* . . . . To be sure, the resolution of these legal issues will entail *consideration of the factual allegations that make up the plaintiff's claim for relief* . . . . [T]he Court has recognized that a question of immunity is separate from the merits of the underlying action for purposes of the *Cohen* test even though a reviewing court *must consider the plaintiff's factual allegations in resolving the immunity issue.*

472 U.S. at 528-29 (emphasis added). *Mitchell* makes clear that the court considers "the factual allegations that make up the plaintiff's claim," not the factual allegations plus the limited "universe of statutory or decisional law" presented to the district court. *See* 975 F.2d at 1392. There is no hint in *Mitchell's* formula that a reviewing court should analyze anything other than the allegations of official misconduct—*factual* allegations—presented to the district court when determining whether the conduct violated clearly established law.

In *Siegert v. Gilley*, 111 S. Ct. 1789 (1991), despite a three-way split on the merits, the Justices agreed on one point: It was the *facts* Siegert alleged, not any particular cases he happened to cite—or not cite—in support of his claim, that mattered for purposes of deciding the qualified immunity question. The Justices seemed perfectly willing to use their own resources to determine and explain what the law was. The majority wrote: "The *facts alleged* by Siegert cannot, in the light of our decision in *Paul v. Davis* be held to state a claim for denial of a constitutional right." *Id.* at 1794 (emphasis added). Focusing on the malice element requisite to Siegert's constitutional claim, Justice Kennedy said: "Upon the assertion of a qualified immunity defense the plaintiff must put forward specific, nonconclusory *factual allegations* which establish malice, or face dismissal. . . . In my view petitioner did not meet the burden of *alleging facts* from which malice could be inferred by other than the most conclusory allegations." *Id.* at 1795 (emphasis added). The dissent said something very similar: "The majority contends that Siegert has not alleged the violation of any 'right,' 'clearly established' or otherwise. In my view, there can be no doubt that *the conduct alleged* deprived Siegert of a protected liberty interest and that this right was clearly established at the time Gilley wrote his letter. Siegert's claim, therefore should surmount Gilley's assertion of qualified immunity." *Id.* at 1797 (emphasis added) (Marshall, J., dissenting). Not one of the opinions purported to limit its analysis to the cases cited by Siegert to the district court. The phrase "legal facts" appears nowhere in the opinion.

Other post-*Davis* Supreme Court qualified immunity cases follow the same pattern. *See, e.g., Anderson v. Creighton*, 483 U.S. 635 (1987); *Hunter v. Bryant*, 112 S. Ct. 534 (1991). In none of the Court's qualified immunity analyses is there support for the panel's rule that a section 1983 (or *Bivens*) plaintiff loses on appeal if,

though his factual allegations show a violation of clearly established law, he did not cite the right case to the district court to prove that the law was clearly established. Of course, in trying to persuade the court, a plaintiff will want to cite precedents that support his claim that the law the defendant violated was clear. But this doesn't mean the district court (or we on appeal) "has no obligation," *see* 975 F.2d at 1396, to determine on its own "whether [the] law was clearly established at the time [the] action occurred," *Harlow*, 457 U.S. at 818. The court's job is to determine the rights of the parties, not to grade motion papers.

III

In an effort to bring its novel theory into the doctrinal mainstream, the panel points to a variety of rules and practices that, it argues, provide support for its approach. None, in fact, do so.

A. The panel offers this revelation: "While most of our qualified immunity opinions make no mention of who came up with the relevant authority, we have in practice looked to the cases cited by the plaintiff." 975 F.2d at 1393. Of course we have. Much of the time the plaintiff does cite all the relevant cases, so referring to the "cases plaintiff cites" is a useful means of pinpointing a successful argument or rejecting an unsuccessful one. Often we refer to the cases cited by the parties to fulfill our duty to render reasoned decisions that assure the litigants their claims have been given careful consideration. Referring to "the cases the plaintiff cites" is a turn of phrase, not a legal doctrine.

Never have we felt limited to considering only those cases plaintiff cites. *Backlund v. Barnhart*, 778 F.2d 1386 (9th Cir. 1985)—the panel's own showpiece precedent—is a good example: In *Backlund*, the court did note that plaintiffs "fail to cite any pertinent authority" to establish a violated right, *id.* at 1389, but it didn't end

its analysis there. Rather, it went on to say: "Nor can [plaintiff's cite any relevant authority], for the following reasons." *Id.* At that point, the court launched into a full-scale analysis of the relevant point of law, without ever hinting that its inquiry was somehow limited by the authorities cited by the plaintiff. Had the *Backlund* court felt itself bound by the cases cited by the plaintiff, all this discussion would have been unnecessary.

Many other qualified immunity cases explicitly go beyond the "universe of authorities" cited by the plaintiff. *See, e.g., Mendoza v. Blodgett*, 960 F.2d 1425, 1431 (9th Cir. 1992) ("No case . . . has been cited to us, *nor have we found any* . . . .") (emphasis added), *petitions for cert. filed*, 61 U.S.L.W. 3303 (Aug. 28, 1992) (No. 92-579) and —— U.S.L.W. —— (Nov. 2, 1992) (No. 92-6560); *Maraziti v. First Interstate Bank of California*, 953 F.2d 520, 523 (9th Cir. 1992) ("Maraziti cites no cases, *and we have found none* . . . .") (emphasis added); *Alexander v. Perrill*, 916 F.2d 1392, 1398 (9th Cir. 1990) ("a similar issue [was] previously litigated and decided in [the plaintiff's] favor—*a case which inexplicably both parties failed to cite in their briefs*") (emphasis added). The careful effort in these cases to seek out and consider authorities not cited by the parties is entirely consistent with what I understand to be our role as judges. The panel's ostrich-like insistence that authorities not cited by the plaintiff in the district court may not be considered on appeal is at odds with this body of case law.

B. The panel also cites a variety of rules which penalize a party for failing to raise a legal issue before the district court. 975 F.2d at 1394-95 & n.4. But none of these is actually analogous; none justifies the panel's doctrinal leap.

The panel's principal analogy is to the rule that we will not normally reverse because of an incorrect jury instruction where the party claiming error did not object. But the

Federal Rules of Civil Procedure expressly deal with the question of how jury instruction may be reviewed on appeal; "No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." Fed. R. Civ. Proc. 51. That the drafter felt it necessary to have a special rule governing this issue suggests that this is the exception from the normal practice. If one could analogize jury instructions to qualified immunity determinations, the analogy would cut against the panel.

But the analogy just isn't there. The purpose of Rule 51 is to require timely objections to instructions so the trial judge has a chance to change them before the jury retires to consider its verdict. Without it, a party who fails to object to a defective instruction would get two bites at the apple. If the party gets a favorable verdict despite the bad instruction, it wins; if the verdict is unfavorable, the party still has a shot at a new trial by appealing on the ground that the instruction was defective. Moreover, the cost of an appellate reversal based on faulty jury instructions—a completely new trial—is obviously very high. With motions for summary judgment based on qualified immunity, on the other hand, there is no incentive to sandbag by failing to point out favorable cases, and the costs of a reversal on an appeal from summary judgment are relatively small.

Equally helpful are the other rules the panel cites as supposed analogies. 975 F.2d at 1395 n.4. Each deals with a particular eddy away from the procedural mainstream; none supports the rule adopted here. Rule 12(h)(1), for example, is a procedural tripwire designed to ensure that certain key issues are raised at the very earliest stage of the litigation. Like Rule 51, it embodies an exception, and suggests, if anything, that the opposite is the general rule. In any event, the waiver set up by this

rule is limited: It applies to certain, largely factual, defenses each of which is listed within the rule itself. Anyone who files an answer and does not list one of these defenses can fairly be deemed to have waived it; it is a far different matter to say that a plaintiff waives every case in F.2d and the U.S. Reports if he does not mention it in an opposition to a summary judgment motion. The remaining three rules—issues not raised by motion for directed verdict cannot be raised on appeal; facts (factual facts, not legal facts) not presented to the district court cannot be raised on appeal; and review of summary judgment is based on the record as it existed at the time the motion was considered—all deal with facts, which are within the peculiar competence of the district courts.

For reasons discussed above, *see* pp. 582-84 *supra*, there is simply no analogizing questions of law to questions of fact. Calling it legal fact simply can't by some peculiar alchemy, turn law into fact. Despite several strained attempts, the panel can find no solid analogy that supports a general rule of waiver of a question of law. This should be an important clue that what we have here is a bold departure from sound and established practice.

IV

The panel's novel rule will serve no one well. Ordinarily, the correct legal result does justice between the parties. By requiring us to ignore the controlling legal precedents and to affirm incorrect legal results, the panel's opinion may require us to affirm many unfair outcomes. The chaotic effects of the panel's rule will not be visited solely on plaintiffs. The government frequently cites cases which run against the general weight of authority in order to show that law which appears to be clearly established is actually muddy. Under *Elder*, if the government fails to cite such a case to the district court, the district court would presumably be free to ignore it, and we would be powerless to reverse the unjust imposition of liability on a government officer.

The panel's ruling also puts attorneys in an extremely awkward position. Under established ethical principles, counsel is required to cite to the district court all binding authorities, not only the favorable ones. Model Rules of Professional Conduct, Rule 3.3(a)(3); Model Code of Professional Responsibility, DR 7-106(B)(1). The same is not true as to facts: A lawyer need not introduce evidence that will defeat his client's claim; it may well be malpractice to do so. But what is a lawyer to do with legal facts? If the majority opinion is read literally, it would seem counsel would have the right—or even the duty—to keep to himself any case law (i.e., any legal facts) which help the other side. Encouraging such fraud on our district courts will neither make the job of district judges easier nor heighten the level of professional ethics among lawyers.

Finally, the panel's ruling will make it nearly impossible for us to develop a workable body of case law dealing with qualified immunity. Under the panel's opinion, decisions on qualified immunity issues merely represent factual findings based on the "record of authorities" presented to the district court. 975 F.2d at 1394. Every qualified immunity decision will be limited to its particular "facts," a term now defined to include the cited cases. Even if we were to begin the peculiar practice of including in our opinions a list of all the precedents cited to the district court, a given decision would only bind panels reviewing cases in which an identical list of authorities was presented below. Our decisions will no longer say what the clearly established law is, but only whether certain cited cases are sufficient, standing alone, to clearly establish the law. The panel opinion would therefore make it exceedingly difficult, if not impossible, to develop a jurisprudence of what constitutes "clearly established law," and would thereby "Balkaniz[e] the rule of qualified immunity" law—exactly what the Supreme Court wants to avoid. *Anderson v. Creighton*, 483 U.S. 635, 646 (1987).

V

The panel's approach, wrong though it be, does have some intuitive appeal. After all, doesn't fairness to the district judge require that we view the case as he did? Who among us has not felt somewhat betrayed when we were reversed based on an argument not fairly presented to us? "Ah," we may have thought, "had they put the matter *that* way, I could well have avoided the error."

But the judicial process isn't about fairness to judges; it's about fairness to the parties. While we often speak in terms of "fairly" presenting a matter to the district court, *see, e.g., Royal Printing Co. v. Kimberly-Clark Corp.*, 621 F.2d 323, 328 n.9 (9th Cir. 1980), we do not mean that the court is somehow disadvantaged because a matter was not fairly presented to it. Properly phrased, the question is: Was the matter presented to the district court in a manner fair to the opposing side?

When the question not raised below is factual in nature —which usually means, among other things, that it is peculiarly within the province of one of the parties—we generally say it is not fairly raised if not presented to the court that has competence over factual matters. This stems from the institutional need to build a record before judicial review can be exercised on appeal. But with questions of law, we deem the matter fairly raised if the issue is presented to the district court; citation to a particular case has never been seen as part and parcel of fairly raising the issue below. The district court can, after all; find cases not cited by one party, and the opposing party has the obligation to help the court by presenting relevant precedent to it. Punishing one party so severely for its failure to exhaust all potentially relevant authority may well help district court judges get rid of cases, and give a windfall to parties lucky enough to come across a weak adversary, but it is hardly fair. De-

termining the law is, after all, a shared responsibility to be borne by the court and the litigants. Where the district judge misses a key precedent and therefore renders an erroneous ruling, the consequences of that error should not be visited entirely on one of the parties.

Finally, the panel's contrary result is also hard to square with our long-standing rule requiring liberal constructions of pleadings in civil rights cases. *See, e.g., Buckey v. County of Los Angeles*, 968 F.2d 791, 794 (9th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3287, 3314, 3394, 3400 (Nov. 30, 1992) (Nos. 92-560 & 92-628); *Gobel v. Maricopa County*, 867 F.2d 1201, 1203 (9th Cir. 1989). Applying an unprecedented rule of strict construction to a category of cases where we have a tradition of going out of our way to reach the merits is the sort of procedural legerdemain that might make sense to those trained in the law, but it does nothing to enhance public confidence in our federal courts.

In sum, the panel has lost sight of the fundamental issue in a section 1983 case: whether or not the officials in question have violated the rights of citizens. Qualified immunity diminishes somewhat the remedies afforded by law to the allegedly wronged individual, but the standards for a grant of immunity reflect a careful balancing process that takes great pains to protect the plaintiff's substantive rights. In defining qualified immunities, each rule must be judged both in terms of how well it protects the substantive right conferred by the statute, and of how much breathing room it gives government officials who must make hard decisions while performing discretionary functions. The panel's rule does nothing at all to help government officials discharge their responsibilities; its only effect is to diminish the rights of aggrieved plaintiffs. This is hardly the type of balancing the Court has said we must perform in adjudicating civil rights cases.

Conclusion

All those who enter the Supreme Court building are greeted by the words "Equal Justice Under Law." All too often this is on!y an aspiration. A party's success sometimes depends as much on the skill of his lawyer as on the strength of his case. But the panel here has taken what was heretofore only a necessary evil and elevated it to a rule of law.

Because I believe the panel has taken a giant step in the wrong direction in a very important area of the law, and that it is incumbent on us as a court to correct the error, I respectfully dissent from the order rejecting the suggestion for rehearing en banc.

REINHARDT, Circuit Judge, with whom Circuit Judge Pregerson joins, dissenting from the order rejecting the suggestion for rehearing en banc.

I join Judge Kozinski's excellent, if understated, dissent, and write separately to emphasize one or two additional points. First and foremost—it is civil rights plaintiffs who once again are the object of hostile and discriminatory treatment by the federal courts. *Elder* sets forth the rule that, in considering a civil rights plaintiff's challenge to a state official's qualified immunity defense, appellate courts may not consider cases or precedents which the plaintiff failed to cite to the district court. As Judge Kozinski politely suggests, this is a limitation on appellate review previously unknown in the annals of Anglo-Saxon jurisprudence.

It remains to be seen whether the same bizzare rule will be applied when *defendants* fail to cite cases to the district court—but even if it is, it is clear that in the vast majority of instances, civil rights plaintiffs will bear the brunt of the *Elder* doctrine. First, plaintiffs are obliged by the nature of the principles governing qualified immunity to rely more heavily on case law than are defendants. The

primary means open to a plaintiff to demonstrate the clarity of the law violated by a state official, and thus to overcome a qualified immunity defense, is the citation of past cases which have established a given rule or legal principle. Defendants, by contrast, may rely simply on the *absence* of cases clearly establishing the relevant law. Defendants are therefore far less likely to fall victim to a rule which harshly penalizes the omission of a citation. Second, civil rights plaintiffs are at a substantial disadvantage with respect to legal resources. While civil rights defendants are generally represented by a legal office composed of a large number of state or local government attorneys, the overwhelming majority of civil rights plaintiffs are unable to obtain comparable representation. Few are in a position to hire a prestigious law firm with a raft of partners and associates, and only a small number obtain representation by an organization with a permanent legal staff of any size. Instead, the victims of civil rights violations must generally rely on lawyers who work in small law offices or as sole practitioners. These lawyers are usually overburdened and rarely have access to the resources and facilities available to the average attorney representing corporate or governmental clients. They are consequently more apt to miss a case than are their governmental opponents. In sum, while we do not yet know whether *Elder* is even formally neutral between civil rights plaintiffs and defendants, it is evident that as a practical matter it is not, and that it is the plaintiffs who will ordinarily fall victim to its inequitable strictures.

I emphasize that no other litigant—whether suing for an antitrust, tort, contract, or copyright violation—risks forfeiture of his right to have the controlling law applied to his case simply because he neglects to cite the appropriate precedent in the district court. For all other litigants, and in all other circuits, the law is the law, *regardless* of the citation of cases below and *regardless* of the quality of the plaintiff's lawyer; for a Ninth Circuit civil

rights plaintiff faced with a qualified immunity defense, however, the law is only controlling if his lawyer brings the particular case to the attention of the district court. Only in a civil rights case and only in our circuit can the failure to cite a particular decision render a federal appellate court powerless to provide a remedy for a blatantly unconstitutional act. Civil rights victims in the Ninth Circuit will thus be doubly victimized: first by a state or local official's violation of their constitutional rights; next when they seek to recover the damages to which they are entitled.

In this case, the panel may not invoke the familiar mantra that the result it reaches, however unjust, is ordained by precedent. No court has ever before concluded that decisional law is *lex non grata* or *loi disparu* if not cited to the district court, nor has any court ever before recognized the existence of the hybrid entity which the panel oxymoronically labels "legal fact." On the contrary, in at least three cases our court has expressly acknowledged its obligation to look beyond the cases cited by the parties in analyzing qualified immunity issues. *See* Kozinski, J., dissenting *supra* at 591. That the panel is itself solely responsible for the establishment of the paradoxical *Elder* rule is further evident from the fact that the rule was neither proposed nor discussed by the parties in their briefs. The panel's *sua sponte* invention of a rule which seriously disadvantages civil rights plaintiffs displays a disregard both for precedent and for the rights of the individuals involved.[1]

---

[1] There is little comfort that an adherent of constitutional rights can take from *Elder*. It is worth noting, however, that while the panel attempts to tie our hands, it has *not* sought to change the district court's traditional role. Even under *Elder*, district courts knowledgeable in the law will continue to apply the relevant law whether or not it has been cited by the plaintiff. *See Elder*, 975 F.2d at 1396.

As Judge Kozinski notes, our en banc process is imperfect. In this respect it is no different from other judicial, governmental, or electoral processes. Misfires occur in all walks of life. However, one aspect of the error we commit here is unique. Under our rules, when we decide not to go en banc, the public is prohibited from learning how the court divided over the issue. The public is even prohibited from learning whether a majority of the court voted against en banc review.[2] The secrecy surrounding our en banc procedure is unhealthy. *See discussion in Harris v. Vasquez*, 949 F.2d 1497, 1539 (9th Cir. 1990) (Reinhardt, J., dissenting), *cert. denied*, 112 S. Ct. 1275 (1992). As in *Harris*, and as in all other en banc proceedings, I think the public, the bar, and the district judges would benefit from knowing the breakdown of the actual vote. For reasons I am not free to reveal, I believe that in the case before us disclosure of the vote would be particularly informative. For that reason, I am especially uncomfortable with the application of our secrecy rule; I will, however, comply with its dictates.

I can conceive of only one good reason for any of my colleagues to have voted against an en banc hearing in this case: because they believe that *Elder* can or will be sharply limted, and they therefore find it unworthy of en banc consideration. *Elder* is certainly susceptible to a future reading that leaves it with little or no significance.

---

[2] In our circuit, an en banc call can be defeated even when a majority of the court does not vote against an en banc hearing. En banc review occurs only when an absolute majority of active judges votes in the affirmative. Thus, a tie vote will always defeat an en banc call. Similarly, a call will fail if a majority of those voting cast a "yes" vote but the "yes" votes do not outnumber the combined "no" votes and abstentions. *See generally Harris v. Vasquez*, 949 F.2d at 1539.

I should add that even where, as here, a dissent from an order denying en banc review is filed, the public cannot tell how many judges favored an en banc hearing. Judges who vote in favor of en banc review frequently do not join the dissent.

The panel only applied its novel rule after expressly stating that doing so would not result in an injustice. *See Elder*, 975 F.2d at 1396. According to the panel, its holdng does no injustice to Elder because consideration of the precedent which Elder failed to cite—*U.S. v. Al-Azzawy*[3]—would have made no difference to the outcome of his case. The panel said that even considering *Al-Azzawy*:

> . . . we are hard pressed to say that the law was so clearly established that a reasonable law enforcement officer in Holloway's shoes would understand that what he was doing violated a constitutional right. *See Ward v. County of San Diego*, 791 F.2d 1329, 1332 (9th Cir. 1986) (the court does not "require of most government officials the kind of legal scholarship normally associated with law professors and academicians"), *cert. denied*, 483 U.S. 1020, 107 S. Ct. 3263, 97 L. Ed. 2d 762 (1987).

Id.

In light of the panel's implicit admission that the result in *Elder* would have been the same with or without the proclamation of its novel rule, it is tempting to dismiss the rule as mere *dicta*. That may be difficult to do here, however, because the rule appears to constitute the raison d'etre for the opinion. Nevertheless, future panels may well conclude that the *Elder* rule should not be invoked if doing so would lead to an unjust result—specifically, if its application would cause a civil rights plaintiff who would otherwise prevail to lose his case.[4]

---

[3] 784 F.2d 890 (9th Cir. 1985), *cert. denied*, 476 U.S. 1144 (1986).

[4] Judge Kozinski argues at n.1 of his dissent that, despite the language of the opinion, *Elder* cannot be interpreted to hold that the panel would have reached the same result if *U.S. v. Al-Azzawy* had been cited to the district court. He bases his argument on *his own* interpretation of *Al-Azzawy* and on the observation that it would be improper and illogical to invent a completely new legal doctrine in order to avoid considering a non-controlling case. Even if Judge Kozinski is correct that, properly construed, *Al-Azzawy* would require reversal of the district court, that cannot change the fact that the panel's view of *Al-Azzawy* was different. It was the panel's view that *Al-Azzawy* did not clearly establish the law, and it was on the basis of that interpretation of *Al-Azzawy* that the panel determined to apply its rule, believing that the result would not be affected. Thus, it is the panel's interpretation of *Al-Azzawy* that we must accept in construing its holding—not Judge Kozinski's. Similarly, that it was improper or illogical for the panel to promulgate a new legal rule under the circumstances present here does not change the fact that the panel did so. We cannot say that because the panel acted illogically or improperly, its opinion does not mean what its language plainly states.

Perhaps it is impatience that prevents me from simply awaiting that result. Doing so might well ensure a peaceful, dignified burial for the bizarre *Elder* rule. However, like Judge Kozinski, I do not believe it is appropriate to let a case which promulgates so glaring an error in so important an area of the law go unchallenged. Rather, I believe that, considering how significantly the *Elder* decision conflicts with precedent, practice, and our obligation to vindicate constitutional rights, we have a duty to correct the panel's error now. I believe we breach that duty by failing to take the case en banc. Thus, for the reasons I have expressed, and for those ably articulated by Judge Kozinski, I dissent from the order denying en banc review.

SUPREME COURT OF THE UNITED STATES

No. 92-8579

CHARLES K. ELDER,
Petitioner

v.

R. D. HOLLOWAY, *et al.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 28, 1993

(5)

Supreme Court, U.S.
FILED
AUG 27 1993
OFFICE OF THE CLERK

No. 92-8579

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

CHARLES K. ELDER,
Petitioner,

v.

R.D. HOLLOWAY, *et al.*,
Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONER

John C. Lynn
LYNN, SCOTT,
HACKNEY & SULLIVAN
1015 W. Hays Street
Boise, Idaho 83702
(208) 342-7600

Michael E. Tankersley
(Counsel of Record)
Brian Wolfman
Alan B. Morrison
PUBLIC CITIZEN
LITIGATION GROUP
2000 P Street, N.W.,
Suite 700
Washington, D.C. 20036
(202) 833-3000

Counsel for Petitioners

August 27, 1993

BEST AVAILABLE COPY

43 pp

QUESTION PRESENTED

In reviewing whether an action against government officials for deprivation of constitutional or statutory rights is precluded by qualified immunity because the rights allegedly violated were not clearly established at the time of the conduct, are appellate courts required to disregard relevant legal authorities if the those authorities were neither identified by the plaintiff nor discovered by the district court?

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, Beverly S. Elder, the common law wife of petitioner, was also a plaintiff and appellant in the proceedings below. *See* Joint Appendix ("JA") at 2-3.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

A. The Arrest and District Court Proceedings 3

B. The Ninth Circuit's Decision 5

SUMMARY OF ARGUMENT 8

ARGUMENT 9

I. WHETHER A FEDERAL RIGHT IS CLEARLY ESTABLISHED IS A LEGAL ISSUE THAT, LIKE OTHER LEGAL ISSUES, MUST BE DECIDED BASED ON THE CONTROLLING LAW AND NOT SOLELY ON THE AUTHORITIES CITED IN THE TRIAL COURT 9

A. The Issue Of Whether Qualified Immunity Is Unavailable Because A Constitutional Or Statutory Right Is Clearly Established Is A Question Of Law 10

B. Legal Issues Are To Be Decided On Appeal Based On The Law, And Not Solely On The Legal Authorities Considered Below. 14

C. The Failure To Cite A Legal Authority Is Not Analogous To Other Contexts Where Failure To Raise A Matter Bars Appellate Consideration . 19

II. THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S DECISIONS ON QUALIFIED IMMUNITY . 22

A. Making Qualified Immunity Dependent Upon The Legal Authorities Cited By The Parties Is Inconsistent With The Objective Legal Standard For Determining Whether Rights Are Clearly Established And Its Underlying Rationale 23

B. The Decision Below Misconstrues The Language of This Court's Decision In *Davis v. Scherer*. 28

C. The Decision Below Compels Unjust Results . 30

CONCLUSION 33

TABLE OF AUTHORITIES

CASES

American Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167 (1990) 16

Anderson v. Creighton, 483 U.S. 635 (1987) 23, 24, 25

Arcadia v. Ohio Power Co., 498 U.S. 73 (1990) 16

Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956) 13

Bose Corp. v. Consumers Union, 466 U.S. 485 (1984) 14, 16, 17

Butz v. Economu, 438 U.S. 478 (1978) 24, 30

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) 12

Commissioner v. Estate of Bosch, 389 U.S. 456 (1967) 13

Davis v. Scherer, 468 U.S. 183 (1984) . . . . . *passim*

Dewey v. City of Des Moines, 173 U.S. 193 (1899) 20

Dothard v. Rawlinson, 433 U.S. 321 (1977) 19

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) 33

Forrester v. White, 484 U.S. 219 (1988) 23, 24, 25

Freytag v. Commissioner of Internal Revenue, 111 S. Ct. 2631 (1991) 19, 20

Giordenello v. United States, 357 U.S. 480 (1958) . . . 21

Griffith v. Kentucky, 479 U.S. 314 (1987) 32

Harlow v. Fitzgerald, 457 U.S. 800 (1982) . . . . . *passim*

Harper v. Virginia Department of Taxation, 113 S. Ct. 2510 (1993) 32

Hormel v. Helvering, 312 U.S. 552 (1941) . . . 19, 21, 22

James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439 (1991) 33

Kamen v. Kemper Financial Services, Inc., 111 S. Ct. 1711 (1991) 15, 16

Lamar v. Micou, 114 U.S. 218 (1885) 15

Lear v. Adkins, 395 U.S. 653 (1969) 15, 20

Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 113 S. Ct. 1160 (1993) 21, 31

Lechmere, Inc. v. National Labor Relations Board, 112 S. Ct. 841 (1992) 11

Malley v. Briggs, 475 U.S. 335 (1986) 28

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) . . 14

Mitchell v. Forsyth, 472 U.S. 511 (1985) 10, 12, 18,19, 25

Negonsott v. Samuels, 113 S. Ct. 1119 (1993) 11

Orloff v. Willoughby, 345 U.S. 83 (1953) 15

Payton v. New York, 445 U.S. 573 (1980) 3

Pierce v. Underwood, 487 U.S. 552 (1988) 13, 14

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) . . 12

Salve Regina College v. Russell, 111 S. Ct. 1217 (1991) . . . . . *passim*

Scheurer v. Rhodes, 416 U.S. 232 (1974) 24

Siegert v. Gilley, 111 S. Ct. 1789 (1991) 10

Singleton v. Wulff, 428 U.S. 106 (1976) 19

Teague v. Lane, 489 U.S. 288 (1989) 12

Tower v. Glover, 467 U.S. 914 (1984) 21

Town of South Ottawa v. Perkins, 94 U.S. 260 (1877) 15, 22, 32

United States National Bank of Oregon v. Independent Insurance Agents of America, Inc., 113 S. Ct. 2173 (1993) 15

United States v. Al-Azzawy, 784 F.2d 890 (9th Cir.), cert. denied, 476 U.S. 1144 (1986) 4, 5

United States v. Edmondson, 791 F.2d 1512 (11th Cir. 1986) 5

United States v. Johnson, 626 F.2d 753 (9th Cir. 1980), aff'd on other grounds, 457 U.S. 537 (1982) 4, 5

United States v. Johnson, 457 U.S. 537 (1982) 11

United States v. Maez, 872 F.2d 1444 (10th Cir. 1989) . 5

United States v. Morgan, 743 F.2d 1158 (6th Cir. 1984), cert. denied, 471 U.S. 1061 (1985) 4

United States v. United States District Court, 407 U.S. 297 (1972) 18

Weems v. United States, 217 U.S. 349 (1910) 19

Young v. United States, 315 U.S. 257 (1942) 15

STATUTES

28 U.S.C. § 46 17

28 U.S.C. § 1254(1) 2

42 U.S.C. § 1983 . . . . . *passim*

COURT RULES

Fed. R. Civ. Proc. 12(h) 19, 20

Fed. R. Civ. Proc. 51 . . . . . 19, 20

Sup. Ct. R. 14.1(a) 20

MISCELLANEOUS

ABA Model Code of Prof. Responsibility, DR 7-106(B)(1) 27

ABA Model Rules of Prof. Conduct, Rule 3.3(a)(3) . . 27

No. 92-8579

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

CHARLES K. ELDER,
Petitioner,

v.

R.D. HOLLOWAY, *et al.*,
Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

OPINIONS BELOW

The opinion of the United States District Court for the District of Idaho is reprinted at JA 2-22 and reported at 751 F. Supp. 858. The December 19, 1991 opinion of the United States Court of Appeals for the Ninth Circuit is set forth at JA 24-30 and published at 951 F.2d 1112. That opinion was amended on September 17, 1991, and the amended opinion is set forth at JA 31-45 and reported at 975 F.2d 1388.

JURISDICTION

Petitioner's timely petition for rehearing and suggestion for rehearing *en banc* were denied on January 27, 1993. JA 46. Petitioner filed a petition for a writ of certiorari with this Court on April 19, 1993, which was granted on June 28,

1993. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This is a civil rights action alleging that the arrest of petitioner Charles K. Elder at his home without a warrant violated the Fourth Amendment. The district court ruled that plaintiff's claims against the arresting officers were barred by qualified immunity because it was not clearly established at the time of the arrest that the circumstances under which petitioner was arrested required a warrant. In so doing, the district court was not aware of a Ninth Circuit case decided a year before the arrest which directly addressed the issue and concluded that, absent exigent circumstances, a warrantless arrest under circumstances similar to those presented here violated the Fourth Amendment. On appeal, the Ninth Circuit affirmed on the basis that this prior case must be ignored on appeal because it was not cited by the plaintiff in the district court. The Ninth Circuit established a new rule that appellate courts must affirm district court decisions denying relief under 42 U.S.C. § 1983 based on

the conclusion that the law was not clearly established at the time of the alleged misconduct, even if the decision is contrary to its own (and other) legal authorities, if those authorities were not cited in the district court.

A. The Arrest and District Court Proceedings

On April 27, 1987, officers from the County of Ada, Idaho, who had been informed that petitioner Charles Elder was wanted by Florida authorities, sought to arrest him without first obtaining an arrest warrant. The officers first tried to arrest Mr. Elder at his place of work but, when they arrived, found that he had gone home. The officers then went to the home where petitioner, his brother, William Elder, and William Elder's family lived. The Ada County officers and sheriff established roadblocks around the house and surrounded it with several armed officers. When petitioner's brother left the house, he was detained by the officers. The officers then used a telephone and police loudspeaker to contact petitioner and urged him to surrender. When they did so, Mr. Elder suffered two epileptic seizures. After petitioner recovered from the second seizure, the officers instructed him that, if he could not walk, he should crawl out of the house. But when petitioner walked through the doorway and onto the porch of the house, he suffered a third seizure and fell face down, hitting his head on the concrete walk. Because of the fall, petitioner sustained severe brain damage that has left him partially paralyzed. JA 2-5, 32-33.

Petitioner brought this action under 42 U.S.C. § 1983, alleging principally that the Ada County sheriff and arresting officers violated his constitutional rights under the Fourth Amendment by arresting him at his home without a warrant. On motions for summary judgment, the district court found that this Court's decision in *Payton v. New York*, 445 U.S. 573 (1980), clearly established that, absent consent or exigent circumstances, arresting an individual at a private residence without an arrest warrant violates the Fourth Amendment.

JA 11-12. Respondents argued that the arrest was lawful under this standard because petitioner left the house voluntarily and the arrest was justified by exigent circumstances, but the district court found that disputed issues of material fact precluded resolving either of these arguments on the summary judgment record. *See* JA 15-16.

The district court concluded, however, that the officers were shielded from liability by the doctrine of qualified immunity recognized by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), because the constitutional rights at issue were not "clearly established" at the time of the arrest. The court said that it "found no controlling Idaho or Ninth Circuit case law" addressing whether an arrest that is effected by officers surrounding a house and requesting that the individual inside surrender constitutes an arrest at the house that requires a warrant. JA 12, 18.

In fact, the Ninth Circuit had addressed this precise issue a year before petitioner was arrested in *United States v. Al-Azzawy*, 784 F.2d 890 (9th Cir.), *cert. denied*, 476 U.S. 1144 (1986). In that case, arresting officers had surrounded a suspect's trailer with guns drawn, ordered the suspect to come outside, and arrested him when he did so. The Ninth Court ruled that this constituted an arrest at the home for which a warrant is required absent consent or exigent circumstances: "since appellee was in his trailer at the time he was surrounded by armed officers, and since he did not voluntarily expose himself to their view or control outside his trailer but only emerged under circumstances of extreme coercion, the arrest occurred while he was still inside his trailer." *Id.* at 893. In reaching this conclusion, the Ninth Circuit endorsed the reasoning of *United States v. Morgan*, 743 F.2d 1158 (6th Cir. 1984), *cert. denied*, 471 U.S. 1061 (1985), in which the Sixth Circuit reached the same conclusion where officers surrounded a suspect's house and used a bullhorn to order him to exit. The Ninth Circuit also relied upon its prior decision in *United States v. Johnson*,

626 F.2d 753 (9th Cir. 1980), *aff'd on other grounds*, 457 U.S. 537 (1982), in which it had stated that "it is the location of the arrested person, and not the arresting agents, that determines whether an arrest occurs within a home," and that arresting officers should not be permitted to "avoid illegal 'entry' into a home simply by remaining outside the doorway and controlling the movements of suspects within through the use of weapons that greatly extend the 'reach' of the arresting officers." *Id.* at 757.[1]

The *Al-Azzawy* decision, however, was not cited by any of the parties, and the district court was apparently unaware of it.

B. The Ninth Circuit's Decision

Petitioner appealed solely on the qualified immunity issue, and the Ninth Circuit affirmed in an opinion issued on December 19, 1991. JA 24-31. On September 17, 1992, the panel *sua sponte* issued an amended opinion reaching the same result. JA 31-45.

The Ninth Circuit's initial opinion acknowledged that the *Al-Azzawy* decision "is closely on point and could make a difference in the outcome of this case" because it "clearly established" the principle that "'"it is the location of the arrested person, not the arresting agents, that determines whether an arrest occurs within a home."'" JA 26-27 (quoting *Al-Azzawy*, 784 F.2d at 893, quoting *United States v. Johnson*, 626 F.2d at 757); *see also* JA 29 (decision below is "arguably erroneous" in light of *Al-Azzawy*). The

---

[1] Like the Ninth and the Sixth Circuits, other circuits have concluded that, absent exigent circumstances, an arrest effected by surrounding a suspect at a residence requires a warrant. *See United States v. Maez*, 872 F.2d 1444 (10th Cir. 1989); *United States v. Edmondson*, 791 F.2d 1512 (11th Cir. 1986). In *Al-Azzawy*, the Ninth Circuit ultimately concluded that the warrantless arrest at the home in that particular case was justified by exigent circumstances. 784 F.2d at 894.

amended opinion similarly observed "that *Al-Azzawy*'s initial conclusion might have alerted a reasonable officer to the constitutional implications of putting a suspect under arrest after he had come outside his house pursuant to an order to exit." JA 35.

Nonetheless, the Ninth Circuit held that it must disregard *Al-Azzawy* on appeal because it had not been cited to, nor discovered by, the district court. It acknowledged that "normally, a district court has to get an issue of law right, and it does not matter which party presents which authorities (or whether the court uncovers them itself)." JA 40. But the court announced a special rule for review of whether civil rights claims are barred by qualified immunity. In reviewing a district court decision denying relief under Section 1983 on the grounds that the rights at issue were not clearly established at the time of the incident, the Ninth Circuit held, an appellate court shall consider only those legal authorities identified by the plaintiff, and those, if any, independently identified by the district court's research. JA 39, 43-45.

The court offered two reasons for this unique restriction on appellate review, known as "the Elder rule." JA 66, 69. First, it concluded that this Court's statement in *Davis v. Scherer*, 468 U.S. 183, 197 (1984), that the plaintiff may overcome an official's qualified immunity "only by showing" that the constitutional rights allegedly violated "were clearly established at the time of the conduct at issue," mandates that the plaintiff must identify all legal authority on the issue as part of the plaintiff's "burden of proof." JA 36-39. Second, it stated that, although the issue of whether constitutional rights are clearly established is a legal question, it should be subject to restrictions that are analogous to the restrictions on appellate treatment of fact issues because it represents a determination of "legal facts." JA 39-40 (amended opinion); *see also* JA 27 (initial opinion) (issue is "akin to a question of fact"). Just as review of factual issues is limited to evidence in the record, the court concluded, appellate review

of whether a constitutional right is clearly established should be limited to the authorities cited in the record. JA 41-43 (amended opinion), and JA 27-29 (initial opinion).

Petitioner's request for rehearing was denied, and his suggestion for rehearing *en banc* was rejected over the dissent of five judges. The dissenting opinions, written by Judges Kozinski and Reinhardt, criticized the panel for creating a "totally new legal doctrine" that mandates that, even on a pure question of law, a court of appeals "must ignore its own (and the Supreme Court's) controlling case law if it was not cited to the court below." JA 47, 64. The dissenting judges argued that treating the legal issue in qualified immunity as a "legal fact" which is dependent upon the authorities cited in the district court record is contrary to longstanding principles recognizing that appellate courts have an obligation to make an "an independent assessment of what the law is." JA 48-50. "The [appellate] court's job," Judge Kozinski observed, "is to determine the rights of the parties, not to grade motion papers." JA 57.

Judge Kozinski's dissent also observed that the Elder rule is contrary to the qualified immunity decisions of this Court. The single sentence the panel relied upon in *Davis v. Scherer*, *supra*, was directed at a wholly different issue and could not reasonably be construed to mandate the "watershed" change in the treatment of legal issues called for by the panel's decision. JA 52-54. Judge Kozinski also pointed out that the Elder rule is not consistent with the rationale behind the objective test for qualified immunity adopted in *Harlow v. Fitzgerald*, *supra*, which directs that "the official's conduct be judged against an objective standard -- the law as it actually was, not as the official thought it was, or as the plaintiff proves it to be." JA 53.

Finally, both Judge Kozinski and Judge Reinhardt noted that the Elder rule would unjustly deny civil rights claimants recovery for violations of clearly established rights. Under the rule, only in civil rights cases "can failure to cite a

particular decision render a federal appellate court powerless to provide a remedy for a blatantly unconstitutional act." JA 66. Moreover, there was no countervailing justification for the rule. As Judge Kozinski put it, "[t]he panel's rule does nothing at all to help government officials discharge their responsibilities; its only effect is to diminish the rights of aggrieved plaintiffs." JA 63.

SUMMARY OF ARGUMENT

The decision below establishes a "novel rule [that] will serve no one well," JA 60, while distorting the appellate process and the doctrine of qualified immunity in a way that can only lead to injustice. Two considerations show that the Ninth Circuit's restriction of appellate review of qualified immunity decisions must be rejected.

First, the decision is inconsistent with the obligation of appellate courts to determine legal issues independently, based on *all* relevant authorities, and not simply those cited to the district court. The issue of whether law is "clearly established" for purposes of assessing qualified immunity claims is a purely legal issue that the decision below improperly treats as a factual issue. Departures from the principle of independent appellate review of legal issues are rare and limited because, as this Court emphasized in *Salve Regina College v. Russell*, 111 S. Ct. 1217 (1991), appellate courts are, as an institutional matter, better suited to accurately resolve legal issues, and independent review fosters coherence and uniformity in the development of the law. The decision below, by preventing appellate courts from correcting legal errors, prohibits them from performing the very function they are designed to serve. Forfeiture and waiver rules that exist in other contexts have never been applied to legal authorities because neither the failure of counsel to cite a particular authority, nor the fortuity of the district court's legal research, should bar an appellate court from determining and applying the correct legal rule.

Second, the decision below departs from the objective standard for qualified immunity in a way that is incompatible with the rationale behind the standard. This Court's decision in *Harlow v. Fitzgerald*, *supra*, established an objective test that balances the need to protect the legitimate exercise of official discretion and the equally important mandate to deter, and provide a remedy for, official misconduct that violates clearly established federal rights. The decision below disturbs this balance by imposing a restriction on appellate review that serves neither of these interests and denies relief in an unpredictable and arbitrary manner. The only support from this Court's qualified immunity decisions cited to justify the decision below, a single sentence from *Davis v. Scherer*, *supra*, provides no support for the novel rule adopted by the Ninth Circuit. Most importantly, by disrupting the balance struck by the objective test for qualified immunity, the decision below requires courts to knowingly and needlessly condone unfair results. The Elder rule thus deprives victims of civil rights violations the statutory remedy provided by Congress, unjustly burdens civil rights plaintiffs, and violates basic tenets of fairness by denying meritorious civil rights claims the benefit of governing law based solely on the failure of their counsel to cite particular legal authorities in the district court.

ARGUMENT

I.
WHETHER A FEDERAL RIGHT IS CLEARLY ESTABLISHED IS A LEGAL ISSUE THAT, LIKE OTHER LEGAL ISSUES, MUST BE DECIDED BASED ON THE CONTROLLING LAW AND NOT SOLELY ON THE AUTHORITIES CITED IN THE TRIAL COURT.

The fundamental error in the decision below is that it requires that appellate courts decide purely legal issues by

disregarding controlling legal authorities -- including their own precedents -- and affirm district court decisions that they know to be wrong. This anomalous rule is contrary to basic principles concerning the distinction between legal and factual issues, and the role of appellate courts in deciding questions of law. This Court has long recognized that the role of appellate courts is to resolve purely legal questions based on their independent judgment, and not simply to select among the interpretations of the law offered by the parties or the district court. The failure of the parties or the district court to cite relevant legal authorities does not diminish or alter this obligation. The decision below should be reversed because it ignores this fundamental doctrine, and the institutional considerations upon which it is based.

A. The Issue Of Whether Qualified Immunity Is Unavailable Because A Constitutional Or Statutory Right Is Clearly Established Is A Question Of Law.

This Court's decisions make clear and, indeed, have frequently emphasized, that the objective test for qualified immunity claims established in *Harlow v. Fitzgerald*, *supra*, presents a pure question of law. In *Harlow* itself, the Court declared that the legal test was designed so that "the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred." 457 U.S. at 818. In *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985), this Court held that an interlocutory appeal from a denial of a qualified immunity claim was permitted, in part, because there is no need for the appellate court to resolve any factual issues; "[a]ll [the appellate court] need determine is a question of law." "We emphasize at this point," the Court stated, "that the appealable issue is a purely legal one: whether the facts alleged (by the plaintiff, or, in some cases, the defendant) support a claim of violation of clearly established law." *Id.* at 528 n.9. Two years ago, in *Siegert v. Gilley*, 111 S. Ct.

1789, 1793 (1991), this Court once again declared that the issue of whether the applicable law is "clearly established" is a "purely legal question."

The Ninth Circuit's conclusion that appellate review of this legal issue is distinguishable from all other legal issues and should be treated like a factual issue because it "requires consideration of legal facts," JA 39, is without precedent or foundation. Appellate review of legal issues always involves examination of existing legal authorities -- or "legal facts" in the parlance of the Ninth Circuit -- to determine whether the law is already "clearly established." For example, where a statute is involved, courts must start by deciding whether the plain language of a statute is determinative. *Negonsott v. Samuels*, 113 S. Ct. 1119, 1123 (1993). Where interpretation of a legal rule is at issue, courts must first examine whether past decisions have settled the interpretive issue as a matter of *stare decisis*. *Lechmere, Inc. v. National Labor Relations Board*, 112 S. Ct. 841, 847-48 (1992). Even where the application of a judicially-created doctrine is at issue, courts must begin by determining whether a case is "clearly controlled by existing precedent." *See United States v. Johnson*, 457 U.S. 537, 548 (1982). The fact that the legal issue in qualified immunity cases requires an examination of the legal authorities to determine if the law was clearly established at the time of the conduct certainly does not make qualified immunity unique.

Nonetheless, the Ninth Circuit concluded that restricting appellate review of the legal issue in qualified immunity cases is warranted because the question of whether the law was "clearly established" (1) restricts the examination of legal authorities to a particular time; and (2) does not require adjudication of the right at issue, only whether it was already clearly established. *See* JA 40-41. There is no dispute that the objective standard established in *Harlow v. Fitzgerald* has these characteristics. But neither of these characteristics is unique to the *Harlow* standard, and, more

importantly, neither justifies restricting appellate review to the authorities cited below.

First, the fact that the qualified immunity test requires the court to "determine what the state of the law was at the point of time in the past when the incident occurred," JA 40, does not warrant treating the issue differently from other legal issues. Many legal standards are framed in such a way that they require a determination of whether past legal authorities established rights that should be protected, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1010-13 (1984), or established a particular rule. *Teague v. Lane*, 489 U.S. 288, 310 (1989); *see also Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971) (requiring consideration of whether prior decisions clearly foreshadowed a particular result). The retrospective focus of such standards does not make such issues any less a question of law.

Moreover, an inquiry into whether the law is clearly established by current authorities, and an historical inquiry into whether it was clearly established by the authorities as of a certain date, are analytically the same. Both inquiries are governed by the principles that control the construction of legal authorities, not by the rules of evidence for factual determinations. For example, a court determining whether the law is clearly established must examine the language of prior decisions, look for conflicts among courts that indicate uncertainty, and determine the effect of statutes. *See Mitchell v. Forsyth*, 472 U.S. at 532-35 & n.12. In doing so, the court must apply the same canons that apply in construing cases and statutes to resolve any other legal issue. Resolving whether a body of legal authorities clearly establish the law, even when the authorities are dated, is still an "essentially legal question." *Id.* at 526.

Second, the fact that *Harlow* requires a court to determine whether existing decisions clearly establish a particular right, as distinguished from considering whether the court itself would find that the right exists, does not warrant different

appellate treatment. This process of determining what legal rules existed, without the discretion to declare a new legal rule, is similar to that presented when state law provides the rule of decision and federal courts "must apply what they find to be the state law," *Commissioner v. Estate of Bosch*, 389 U.S. 456, 465 (1967), without altering rights established by past state court decisions. *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 203-05 (1956). Yet this Court has held that finding state law is a legal issue on which "*no* form of appellate deference is acceptable." *Salve Regina College v. Russell*, 111 S. Ct. 1217, 1224 (1991) (emphasis added). There is no reason to treat the legal issue of qualified immunity, in which federal courts are called upon to "find" the federal law as of the time an action occurred, as subject to a different standard of appellate consideration.[2]

[2] The decision in *Pierce v. Underwood*, 487 U.S. 552 (1988), is not to the contrary. There, the Court concluded that *de novo* review was not appropriate for cases under the Equal Access to Justice Act, 28 U.S.C. § 2412(d), where the issue is whether the government's position was substantially justified on the merits because the issue is "not what the law now is, but what the Government was substantially justified in believing it to have been." *Id.* at 561. In *Pierce* the Court was concerned that "a ruling that the Government was not substantially justified in believing it to be thus-and-so would (unless there is some reason to think it has changed since) effectively establish the circuit law in a most peculiar, second hand-fashion." *Id.* at 561. The qualified immunity standard, however, does not entail such a danger of establishing previously unestablished law because it requires a direct inquiry into the opposite question: whether the law was clearly established at the time of the conduct. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Put simply, there is no harm at all to the legal process in stating that the law was clearly established at a particular time, as *Harlow* demands. Moreover, the decision in *Pierce* in no way precludes an appellate court evaluating the justifications for the government's conduct from

(continued...)

B. Legal Issues Are To Be Decided On Appeal Based On The Law, And Not Solely On The Legal Authorities Considered Below.

It is well established that in deciding questions of law, the courts have a special, independent obligation to strive to get the answer right. Although the burden of proving facts rests on the parties, and a court may not decide factual issues based on evidence outside the record, a court's responsibility for accurately determining the law has never been limited in this manner. Similarly, appellate courts are required to give deference to a trial court's findings of fact, but questions of law are to be determined *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 557-58 (1988); *Bose Corp. v. Consumers Union*, 466 U.S. 485, 501 (1984). In short, it is "the province and the duty of the judicial department is to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and neither the strategic decisions of the parties on what legal arguments they will make, the shortcomings of the litigants' presentations, nor the flaws in the lower court's research, should deter an appellate court from that duty.

The Elder rule defies these basic principles. Under the decision below, appellate review is reduced to an exercise in determining whether the district court misread the decisions cited, and errors of law are to be affirmed on appeal if authorities that set forth the correct rule were not cited by the plaintiff. The appellate court is prohibited from exercising its independent judgment. Instead, the court must treat legal authorities -- even a decision written by a member of the appellate panel -- as if they are matters of evidence and ignore them if they were not placed in the record below.

---

[2](...continued)
considering its own or other relevant precedent if the precedents were not cited to the district court.

Treating legal questions like fact disputes in this manner ignores the significant differences between the role of courts in deciding each type of issue. The witnesses and evidence necessary to determine the facts are uniquely available to the parties to the dispute, whereas the sources consulted in determining legal issues are fully accessible to the court. Thus, courts have always been "bound to take judicial notice" of statutes and opinions "without plea or proof." *Lamar v. Micou*, 114 U.S. 218, 223 (1885). Moreover, in finding facts, courts act to resolve disputes that are particular to the parties and a given case. But in deciding questions of law, courts must be cognizant of the fact that "judgments are precedents" that should define the legal rules that will govern other parties and other disputes. *Young v. United States*, 315 U.S. 257, 259 (1942). Accordingly, the responsibility for accurately deciding the legal issues "cannot be left merely to the stipulation of the parties," but rests squarely with the courts. *Id.*; *Town of South Ottawa v. Perkins*, 94 U.S. 260, 267 (1877) (whether something is or is not the law "is a judicial question, to be settled and determined by the courts and judges.")

For these reasons, this Court's decisions have repeatedly rejected the suggestion that courts should be limited to the presentations made by the parties when deciding legal issues. *See, e.g., Lear v. Adkins*, 395 U.S. 653, 662 n.10 (1969); *Orloff v. Willoughby*, 345 U.S. 83, 87-88 (1953). "When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Financial Services, Inc.*, 111 S. Ct. 1711, 1718 (1991); *accord United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 113 S. Ct. 2173, 2178 (1993). Indeed, this Court has sometimes concluded that the resolution of the legal issues presented by a case requires consideration of legal principles and authorities that were *not* relied upon by the parties. *See*

Arcadia v. Ohio Power Co., 498 U.S. 73, 77 (1990). As Judge Kozinski put it, "in our system, . . . the adversaries present their versions of the law to the court and the court renders its determination after making an independent assessment of what the law is." JA 50; *see also American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 219 (1990) (Stevens, J. dissenting, joined by Brennan, Marshall, and Blackmun, JJ.) (rejecting view that "the law applicable to a particular case is the law which the parties believe in good faith to be applicable to the case").

The decision below ignores these precedents. Given that the courts have the power to consider legal issues that are not raised by the parties in order "to identify and apply the proper construction of governing law," *Kamen*, 111 S. Ct. at 1718, the courts certainly must have the authority and, indeed, the duty, to consider the legal authorities that define the "governing law," regardless of whether they are identified by the parties. The Ninth Circuit's decision to the contrary simply abdicates the responsibility of courts to decide questions of law accurately based on the applicable law.

At the appellate level, the courts' independent responsibility for deciding questions of law is embodied in the rule that appellate courts review questions of law *de novo*, a "constitutional responsibility that cannot be delegated to the trier of fact." *Bose Corp. v. Consumers Union*, 466 U.S. at 501. The anomalous restriction on appellate review imposed by the decision below not only violates this principle of independent review, but ignores the institutional considerations on which it is founded. In *Salve Regina College v. Russell*, *supra*, this Court held that courts of appeals must not give any form of deference to district court decisions determining the content of state law. Such deference is improper, the Court found, because *de novo* appellate review is rooted in two fundamental institutional considerations: the role of appellate courts in ensuring

accurate determination of legal issues and fostering doctrinal coherence in the law. *Id.* at 1221.

First, appellate courts are in a better position to correctly decide legal issues. "[T]he logistical burdens of trial advocacy limit the extent to which trial counsel is able to supplement the district judge's legal research with memoranda and briefs." *Id.* Likewise, the district courts' responsibilities for reviewing evidence and deciding factual issues limit trial judges' ability to give full consideration to legal issues. *Id.*

> Courts of appeals, on the other hand, are structurally suited to the collaborative juridical process that promotes decisional accuracy. With the record having been constructed below and settled for purposes of appeal, appellate judges are able to devote their primary attention to legal issues. As questions of law become the focus of appellate review, it can be expected that the parties' briefs will be refined to bring to bear on the legal issues more information and more comprehensive analysis than was provided for the district judge. Perhaps most important, courts of appeals employ multi-judge panels, see 28 U.S.C. §§ 46(b) and (c), that permit reflective dialogue and collective judgment.

Id.

Second, independent appellate review of legal issues best serves the "goal of doctrinal coherence." *Id.* at 1222. Through *de novo* review, appellate courts develop and articulate consistent legal rules to govern lower courts, but restricted review invites divergent rulings among the district courts. *Id.*; *see also Bose Corp. v. Consumers' Union*, 466 U.S. at 502-03 (independent appellate review is necessary to insure correct application of actual malice standard in libel actions and its coherent development through case-by-case adjudication).

This Court's reasoning in *Salve Regina* is equally applicable to review of the legal issue presented here. The Court's observation that "logistical burdens of trial advocacy" limit trial counsel's ability to "supplement the district judge's legal research," 111 S. Ct. at 1221, is just as true in civil rights actions as it is in diversity cases. Appellate review is designed to afford the opportunity for "more comprehensive analysis than was provided for the district judge." *Id.* This objective is obviously subverted if, as the Ninth Circuit held, the appellate court must disregard any additional authorities identified by a more thorough inquiry on appeal.

The decision below also thwarts the law-declaring function of appellate review and frustrates the development and application of consistent legal rules. *Id.* at 1222. Under the Elder rule, appellate courts reviewing qualified immunity issues only determine what the law would be based on the "universe of authorities produced by the plaintiff," JA 43 -- a universe that may be different from the one in which officials who are subject to liability under the civil rights laws, and courts deciding subsequent cases, operate. Under this theory, because each determination of the legal issue depends on the "legal facts" in the record, "it has no precedential effect . . . as to a subsequent case where the record is different." JA 43. This not only ignores the institutional function of appellate courts in promoting accuracy and coherence in resolution of legal issues, but actually mandates inconsistency.[3]

---

[3] The Ninth Circuit simply errs when it characterizes qualified immunity decisions as having no role in deciding "what the law is." JA 41. For example, in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), this Court decided that, prior to this Court's decision in *United States v. United States District Court*, 407 U.S. 297 (1972), it was not clearly established that warrantless, domestic wiretaps for national security purposes were unconstitutional. 472 U.S. at

(continued...)

C. The Failure To Cite A Legal Authority Is Not Analogous To Other Contexts Where Failure To Raise A Matter Bars Appellate Consideration.

The Ninth Circuit sought to buttress its decision by analogizing the restriction introduced by the Elder rule to other rules that bar appellate review of matters not presented below. *See* JA 41 & n.4. The analogies, however, are misplaced and provide no justification for a rule that requires appellate courts to ignore applicable precedents in civil rights cases.

Appellate courts may decline to consider legal issues that are raised for the first time on appeal. *See Dothard v. Rawlinson*, 433 U.S. 321, 323 n.1 (1977). This is a permissive canon which leaves the decisions as to whether new issues will or will not be considered "to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976); *see also Freytag v. Commissioner of Internal Revenue*, 111 S. Ct. 2631, 2639 (1991); *Hormel v. Helvering*, 312 U.S. 552, 556-57 (1941); *Weems v. United States*, 217 U.S. 349, 362 (1910). Some court rules also mandate that specific legal issues are barred unless presented to the district court. Thus, under Fed. R. Civ. Proc. 51, objections to jury instructions are forfeited unless the grounds for the objection were raised before the charge to the jury. Fed. R. Civ. Proc. 12(h) provides that certain procedural defenses -- personal jurisdiction, venue, insufficiency of

---

[3](...continued)
530-31. This decision unquestionably determined this issue, on which the appellate courts had previously disagreed, *id.* at 519, *as a matter of law*, and any pending or subsequent cases presenting the issue were bound by this precedent -- as with any other legal issue. Such decisions on qualified immunity, no less than any other decisions, declare "what the law is" and should be decided in the same way as other questions of law.

process or service of process -- are waived unless included in a motion or responsive pleading.

Both the general canon and the specific court rules, however, are very different from the Elder rule. First, both the canon and the court rules apply only to new legal *issues*, not to new legal *authorities*. Indeed, they do not even apply to new arguments that are fairly embraced within the issues raised below. *Cf. Dewey v. City of Des Moines*, 173 U.S. 193, 198 (1899) ("Parties are not confined here to the same arguments which were advanced in the courts below" but cannot raise an entirely new question); Sup. Ct. R. 14.1(a) (questions presented are "deemed to comprise every subsidiary question fairly included therein.") Because one of the functions of appellate review is to provide comprehensive analysis of the legal issues, courts have not only permitted, but expected, parties and the appellate court itself to refine and expand both the legal argument and the authorities considered on appeal. *Salve Regina*, 111 S. Ct. at 1217; *Lear v. Adkins*, 395 U.S. at 662 n.10 (court has "the duty to consider the broader implications of" the legal contentions presented, even if this requires going beyond the arguments advanced below).

Second, both the canon and court rules are, at least in part, rooted in a concern that parties should not be permitted to "sandbag" and spring a new issue in the late stages of a case that will require retrial or unfairly prejudice an opposing party. If Rules 51 and 12(h) did not exist, there would be a strategic advantage in *not* raising jury instruction errors and personal jurisdiction defects until the end of the litigation so that a party disappointed in the outcome could obtain a retrial or escape an unfavorable judgment. *See Freytag v. Commissioner of Internal Revenue*, 111 S. Ct. 2631, 2647 (1991) (Scalia, J., concurring in part) (forfeiture rules are designed to prevent strategic sandbagging). The general principle that appellate courts may decline to consider new arguments also reflects a concern that allowing a party to

introduce a new issue may "unfairly deprive [an opposing party] of adequate opportunity to respond." *Giordenello v. United States*, 357 U.S. 480, 488 (1958); *see also Hormel v. Helvering*, 312 U.S. at 556 (new issues are generally not considered on appeal so litigants are "not surprised on appeal by a final decision there of issues upon which they have had no opportunity to introduce evidence.")

No such justification exists for the Elder rule. There is no incentive for a plaintiff opposing a claim of qualified immunity to withhold helpful precedent until the appeal. The unfairness to the opposing party that may result from entertaining a new *issue* that changes the focus of a case is also very different from considering additional legal *authority* that helps resolve a legal issue that has already been joined. Moreover, while erroneous jury instructions or personal jurisdiction defects may mandate repetition of an entire trial, qualified immunity determinations are subject to immediate appellate review so that appellate courts can correct errors by the district courts before trial. *Mitchell v. Forsyth*, 472 U.S. at 530.

Third, the court rules cited by the Ninth Circuit only serve to underscore that the Elder rule is an anomalous exception to the general rule that appellate courts review legal issues *de novo* and may even consider new issues. The fact that these exceptions to court rules are limited to particular circumstances demonstrates that additional exceptions should not be created by judicial interpretation. *Cf. Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 113 S. Ct. 1160, 1163 (1993) (Rules 8 and 9(b) indicate that any heightened pleading requirement for civil rights actions must be introduced by amendment, not by interpretation); *Tower v. Glover*, 467 U.S. 914, 922-23 (1984) (courts "do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy.")

The Ninth Circuit also sought to justify the Elder rule by analogy to the principle that appellate courts "never consider *facts* not presented to the district court," including facts omitted from the summary judgment record. JA 41 n.4 (emphasis in original). This analogy fails, however, because, as discussed above, that principle arises out of the "respective institutional advantages of trial and appellate courts." *Salve Regina*, 111 S. Ct. at 1222. In addition, fairness to the parties requires that, because factual matters must be joined by marshalling testimony and exhibits that are peculiarly within the province of the parties, and are subject to response and rebuttal, facts must be presented before the record is closed in the district court. *Id.* But legal authorities are not subject to cross-examination or impeachment. A critical difference between legal and factual issues is that "[t]here can be no estoppel in the way of ascertaining the existence of a law." *Town of South Ottawa v. Perkins*, 94 U.S. at 267. The overriding mandate is that the court resolve the legal issue based on "the truth of the fact . . . and not according to the shifting circumstances of the parties." *Id.* The Ninth Circuit's directive that appellate courts restrict review of qualified immunity cases to the authorities cited below, even when it leads to unjust results, must be reversed because it neglects the fundamental axiom that "[r]ules of practice and procedure are devised to promote the ends of justice, not to defeat them." *Hormel v. Helvering*, 312 U.S. at 557.

II.
THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S DECISIONS ON QUALIFIED IMMUNITY.

"[T]his Court has been cautious in recognizing claims that government officials should be free of the obligation to answer for their acts in court," and has insisted that such immunities be "justified by overriding considerations of

public policy." *Forrester v. White*, 484 U.S. 219, 223-24 (1988). Accordingly, the Court's qualified immunity decisions strike a careful balance between the interest in immunizing official actions, and the countervailing interest in vindicating violations of federal rights in accordance with the statutory mandate of Section 1983.

The decision below disrupts this balance by ignoring the rationale behind this Court's qualified immunity decisions. Moreover, it offers no alternative rationale that would justify extending qualified immunity by placing restrictions on appellate review. Instead, the Ninth Circuit's ruling is based on a misinterpretation of this Court's opinion in *Davis v. Scherer*, 468 U.S. 183 (1984), and it produces results which are unjust and inconsistent with the qualified immunity decisions of this Court.

A. Making Qualified Immunity Dependent Upon The Legal Authorities Cited By The Parties Is Inconsistent With The Objective Legal Standard For Determining Whether Rights Are Clearly Established And Its Underlying Rationale.

The standard for qualified immunity has been precisely articulated by this Court: government officials are shielded from liability only if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. at 818. The standard is deliberately based on an "'objective'" assessment of "the legal rules that were 'clearly established'" at the time of the challenged conduct. *Anderson v. Creighton*, 483 U.S. 635, 639, 641 (1987).

The Elder rule abandons this standard. The decision below changes the test from an assessment of the clarity of the actual legal rules to the clarity of the law "proffered by the plaintiff." JA 44-45, 50. Thus, the conduct is not evaluated based on whether government officials violated rights that were, in fact, clearly established, but on whether

they are clearly established under the artificial "universe of statutory or decisional law" cited by the plaintiff. JA 36.

This altered standard improperly transforms the *Harlow* standard "from a guarantee of immunity into a rule of pleading." *Anderson v. Creighton*, 483 U.S. at 639. Qualified immunity is concerned with determining when government officials should be held personally liable for violations of constitutional rights, and not with problems of pleading or proof. Consequently, in *Anderson*, the Court held that the standard should not be defined on such an abstract level that immunity can be defeated by the manner in which the violation of the plaintiff's rights is alleged after the fact. *Id.* at 640. For the same reason, the validity of an immunity claim should not depend on what legal authorities are identified in litigation after the alleged misconduct. The language in *Harlow* itself makes plain that the clarity of the law is not a matter of proof, but a matter for independent determination by the court:

> On summary judgment, *the judge appropriately may determine*, not only the currently applicable law, but *whether the law was clearly established* at the time the action occurred.

Harlow v. Fitzgerald, 457 U.S. at 818 (emphasis added).

Moreover, the Ninth Circuit's standard ignores the rationale behind qualified immunity. Qualified immunity is based on a balancing of "[t]he public interest in deterrence of unlawful conduct and in compensation of victims," *Id.* at 819, against the countervailing interest in not deterring public officials from executing their "office[s] with the decisiveness and the judgment required by the public good." *Scheurer v. Rhodes*, 416 U.S. 232, 240 (1974); *see also Forrester v. White*, 484 U.S. at 223; *Butz v. Economu*, 438 U.S. 478, 497 (1978). Thus, the goal of the *Harlow* standard is to define both those situations where official action should and should not be deterred. Where the law is not clearly defined, qualified immunity exists so that officials are not "induced to

act with an excess of caution or otherwise to skew their decisions." *Forrester v. White*, 484 U.S. at 223. On the other hand, "[w]here an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action." *Harlow*, 457 U.S. at 819. It is, therefore, central to the *Harlow* test to create an objective standard that permits government officials "'reasonably [to] anticipate when their conduct may give rise to liability for damages.'" *Anderson v. Creighton*, 483 U.S. at 646 (quoting *Davis v. Scherer*, 468 U.S. at 195); *accord Mitchell v. Forsyth*, 472 U.S. at 524.

The Elder rule bears no relationship to this underlying rationale, and does not foster either of the interests served by qualified immunity. There is no way for government officials to anticipate whether the plaintiff's counsel and the district court will fail to identify the authorities showing that the official's conduct violated a clearly established right. Moreover, even if it were possible to anticipate when legal authorities would be overlooked, there would be no reason to encourage officials to conduct themselves based on such predictions. As Judge Kozinski's dissent noted, "*Harlow* doesn't say that 'officials should be made to hesitate' when plaintiff can cite a case that says they should." JA 53. Yet, the Elder rule misconstrues qualified immunity to establish just such an irrational test.

Thus, the rule does nothing to protect the ability of public officials to exercise their discretion where the law is uncertain. At the same time, it immunizes the conduct of officials that *do* violate clearly established rights and denies compensation to their victims on an essentially random basis. Regardless of the severity of the violation, the Elder rule forecloses the remedy created by Congress for violation of federal rights solely because of the failure of counsel or the district court to cite controlling legal authorities.

As a result, the Elder rule upsets "the balance that [this Court's] cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties." *Davis v. Scherer*, 468 U.S. at 195. In *Davis v Scherer*, the plaintiff sought a modification to the *Harlow* standard that would have permitted a plaintiff in a Section 1983 action to defeat qualified immunity by showing that the conduct violated clearly established state law, even if the violation of federal rights that formed the basis for the claim was not clearly established at the time of the conduct. This Court rejected such a rule because it would impose liability based on federal rights that were not clearly defined or foreshadowed at the time of the conduct and, thus, could not be anticipated by officials protected by the qualified immunity doctrine. *Id.* The Elder rule similarly disrupts the balance by allowing officials to escape liability based on subsequent events that cannot be anticipated. Moreover, the basis on which the Elder rule extends immunity, namely the failure of counsel to cite certain authorities in the district court, bears no relationship to whether there should be liability and compensation for the underlying conduct.[4]

The Elder rule also disrupts the balance adopted in *Harlow* by undermining the symmetry of its objective standard. The *Harlow* standard forecloses any inquiry into

---

[4] Although the Ninth Circuit panel did not directly confront the issue, its prohibition on considering authorities not cited to the district court may apply to authorities that would support the defendant's qualified immunity defense. *See* JA 60, 64. If so, the rule would also disturb the balance struck in the *Harlow* standard by imposing liability on officials whose conduct did not violate any clearly established rights. Where a district court denies qualified immunity because legal authorities that demonstrate that the law is unclear are not cited to the district court, appellate courts will "be powerless to reverse the unjust imposition of liability on a government officer." JA 60.

whether the defendant took the action with the malicious intention to deprive the plaintiff of protected rights, because "[t]here are special costs to 'subjective' inquiries of this kind." 457 U.S. 815-16. The Elder rule, however, provides that the objective inquiry into whether the law is clearly established will be subjectively-defined by the legal research and selection of the relevant cases by plaintiff's counsel and the district court. JA 44. This subjective definition of the objective test creates perverse incentives for government counsel. Longstanding ethics rules require lawyers to inform the courts of controlling, adverse precedents that are not identified by their opponents. ABA Model Rules of Prof. Conduct, Rule 3.3(a)(3); ABA Model Code of Prof. Responsibility, DR 7-106(B)(1). The decision below, however, places a unique premium on not informing the court of such precedents by providing that, if the district court is unaware of the precedent, it cannot be considered on appeal. As a result, the Elder rule creates an incentive for government counsel *not* to pursue legal research on the obligations of his clients under existing law since such research might lead to the discovery of precedents that the government would be obligated to disclose in later litigation. *Cf.* JA 61 (rule encourages fraud on district courts). Thus, where *Harlow* mandated an objective standard that would provide an incentive for government counsel to see that officials are informed of their obligations under clearly established law, the Elder rule undermines the incentive to research those obligations by defining what is clearly established based on a subjective standard.

In addition to being inconsistent with the rationale behind qualified immunity, the Elder rule also fails to advance any other substantial public interest that would justify extending official immunity in Section 1983 actions. There is no compelling need to strengthen the already powerful incentives for parties to cite helpful authorities. Moreover, there is little logic in chastising blunders by counsel in legal research by denying recovery to claimants and immunizing official

misconduct. This Court has previously rejected the suggestion that an official who violates clearly established federal rights should be able to assert immunity based on the fortuitous error of a third party. In *Malley v. Briggs*, 475 U.S. 335 (1986), this Court rejected the claim that an official who violates clearly established rights, by applying for a warrant that a reasonable officer would know is not supported by probable cause, is entitled to absolute immunity if the magistrate also errs and issues the warrant. *Id.* at 345. In an "ideal system," unreasonable requests for warrants would never be approved, just as all relevant legal authorities would be identified during the district court proceedings. But, as recognized in *Malley*, "ours is not an ideal system." *Id.* Similarly, here, the failure of plaintiff's counsel and the district court to cite a particular authority does not provide a basis for affording immunity for conduct that violates clearly established federal law.

B. The Decision Below Misconstrues The Language of This Court's Decision In *Davis v. Scherer*.

From all this Court's decisions discussing qualified immunity, the Ninth Circuit latched on to a single sentence at the conclusion of the opinion in *Davis v. Scherer*, 468 U.S. 183, as the basis for its decision. From this Court's statement that "[a] plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue," *id.* at 197, the Ninth Circuit concluded that the reference to making a "showing" means that plaintiffs have the burden of "identifying the universe of relevant statutory or decisional law from which the court can determine whether the right allegedly violated was clearly established," in the same way that plaintiffs bear the burden of placing relevant facts in the record. JA 39. Examination of the decision in *Davis*, however, demonstrates that the

Ninth Circuit has attributed to the word "showing" an elaborate meaning that was never intended.

First, the decision in *Davis v. Scherer* was not concerned with what authorities were to be considered in determining the legal issue in qualified immunity claims, much less with creating a special rule for appellate review. Rather, the issue presented in that case was whether qualified immunity is defeated where an official's conduct violates *any* clearly established legal duty, including a duty under state law -- or whether the clearly established right must be the federal right on which the cause of action is based. *Davis v. Scherer*, 468 U.S. at 193-96 & n.14. In holding that qualified immunity is overcome only if the right that gives rise to the cause of action is clearly established, this Court reaffirmed the objective standard announced in *Harlow*. *Id.* at 191. In that context, it is clear that the purpose of the closing sentence quoted by the Ninth Circuit is to emphasize that a plaintiff has the task of "showing that *those* rights" that are the basis for the cause of action -- and not some other rights -- "were clearly established at the time of the conduct at issue." *Id.* at 197 (emphasis added). Nothing in the opinion suggests that this Court intended to create a special rule governing the manner in which legal issues are to be determined in qualified immunity cases.

Second, in a footnote, the majority in *Davis v. Scherer* invoked the ordinary rule that appellate courts are presumed to be aware of and to apply their own precedents. *Id.* at 192 n.9 ("We see no reason to doubt . . . that the Court of Appeals . . . had full knowledge of its own precedents and correctly construed them.") This language belies the Ninth Circuit's claim that the *Davis* opinion supports its conclusion that appellate courts must *not* apply their own precedents if they were not cited in the district court.

Finally, *Davis v. Scherer* not only reaffirmed the objective standard in *Harlow*, but also held that engrafting exceptions that bear no relationship to its underlying rationale would

only "disrupt the balance" established in prior cases. *See supra* p. 26. That reasoning is equally applicable to the Elder rule, and underscores the extent to which the decision, by misconstruing a single word, distorts the analysis that should be applied in qualified immunity cases.

C. The Decision Below Compels Unjust Results.

The ultimate harm of restricting appellate review and extending qualified immunity based on the Elder rule is the injustice that it visits on civil rights plaintiffs. It is axiomatic that a just outcome presumptively requires applying the *correct* legal rule, not knowingly endorsing a decision based on an error of law. The decision below, however, requires that appellate courts affirm district court decisions that they know to be contrary to the controlling law. As a result, the decision mandates unfair results in three distinct ways.

1. The most blatant injustice of the Elder rule is that it requires appellate courts to affirm the dismissal of meritorious claims seeking compensation for violations of clearly established federal rights, based solely on the fortuity that the requisite legal authorities were not cited below. Such a denial of a compensatory remedy would be unfair in any context, but is particularly significant where it impairs the vindication of constitutional rights. "In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow v. Fitzgerald*, 457 U.S. at 814. Moreover, there is no just reason to create a rule that permits government officials to "discharge their duties in a way that . . . they should know transgresses a clearly established constitutional rule," and do so with impunity. *Butz v. Economu*, 438 U.S. at 507. Nonetheless, the Elder rule forecloses the remedy for such official misconduct on an arbitrary basis. The fact that the legal research during the district court proceedings was imperfect hardly justifies punishing the plaintiff by restricting appellate review in a way that requires dismissal

of the plaintiff's claim, no matter how meritorious. *See* JA 62-63.

2. The rule unjustifiably imposes an unique and unfair burden on civil rights plaintiffs. First, "no other litigant -- whether suing for an antitrust, tort, contract, or copyright violation -- risks forfeiture of his right to have the controlling law applied to his case simply because he neglects to cite the appropriate precedent in the district court." JA 65 (Reinhardt, dissenting). There is no principled reason for imposing a limitation on civil rights claims that exists in no other type of litigation. *Cf. Leatherman*, 113 S. Ct. at 1163.

Second, even assuming that the rule bars appellate consideration of uncited authorities whether they aid plaintiffs or defendants, defendants will be its primary beneficiaries. Under *Harlow*, the absence of legal authority is sufficient to sustain a qualified immunity defense, but a plaintiff can only prevail if the legal rules are clearly established. JA 40. Thus, plaintiffs are more likely to be victims of the rule where, as occurred in this case, the district court concludes that the decisions cited below are not sufficiently clear, and a more direct precedent is not considered until the appeal.

Finally, civil rights plaintiffs are also more likely than defendants to suffer from a rule that penalizes omissions in legal research. Many civil rights claimants must rely on small firms and solo practitioners, or proceed *pro se*. As a result, they are more likely to have limited resources for legal research, and to be vulnerable to missing relevant authorities because of the "logistical burdens of trial advocacy." *Salve Regina*, 111 S. Ct. at 1221. Defendants asserting qualified immunity, on the other hand, will usually be represented by government attorneys who not only have access to more extensive resources and personnel, but regularly litigate qualified immunity issues. The practical effect of the rule will be to require appellate courts to enhance the impact of the disproportionate resources between individual civil rights claimants and institutional defendants

by providing that an omission in legal research creates immunity for defendants who should be held liable under the governing law, without any countervailing benefit.

3. The rule also creates unfair outcomes by mandating that appellate courts treat civil rights plaintiffs with similar claims differently. "'[T]he principle of treating similarly situated [parties] the same,'" is a basic norm of adjudication. *Harper v. Virginia Department of Taxation*, 113 S. Ct. 2510, 2516 (1993) (quoting *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987)). Yet, under the Elder rule, each qualified immunity case depends upon the legal authorities cited in that particular case, and not on any uniform rule of law. JA 43. Thus, claims that are indistinguishable on their facts may result in different outcomes because appellate courts are required to apply different legal standards. For example, if defendants in this action had arrested petitioner and another individual together in the house without first obtaining a warrant, and the second individual filed a separate Section 1983 action before a district judge who was aware of the *Al-Azzawy* precedent, the second plaintiff might be able to defeat qualified immunity, even though the official misconduct was identical to that which the court held was immune in this case. Indeed, if the district judge in the second action entered summary judgment despite being aware of the *Al-Azzawy* decision, on appeal the appellate court might be required to affirm dismissal of petitioner's action and to reverse the identical ruling in the second case, based solely on the differences in the authorities considered by the two district judges.

Thus, the Elder rule deliberately thwarts the rule of law by mandating that a legal rule could "be a law in one case and for one party, and not a law in another case and for another party; a law to-day, and not a law to-morrow." *Town of South Ottawa v. Perkins*, 94 U.S. at 267. Permitting the substantive law to "shift and spring" in this manner, so that similar cases are governed by different rules,

is fundamentally unfair and constitutionally suspect. *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439, 2447 (1991) (opinion of Souter, J.); *cf. Erie R. Co. v. Tompkins*, 304 U.S. 64, 74-75 (1938) (pre-*Erie* doctrine of applying "general law" in federal court, while state courts applied state law, rendered equal protection of the law impossible). Institutionalizing such inequity by mandating affirmance of known legal errors, as the Elder rule does, is plainly improper.

CONCLUSION

The Ninth Circuit's decision should be reversed.

Respectfully submitted,

John C. Lynn
LYNN, SCOTT,
HACKNEY & SULLIVAN
1015 W. Hays Street
Boise, Idaho 83702
(208) 342-7600

Michael E. Tankersley
(Counsel of Record)
Brian Wolfman
Alan B. Morrison
PUBLIC CITIZEN
LITIGATION GROUP
2000 P Street, N.W.,
Suite 700
Washington, D.C. 20036
(202) 833-3000

Counsel for Petitioners

August 27, 1993

FILED
SEP 29 1993
OFFICE OF THE CLERK

No. 92-8579

In The

Supreme Court of the United States

October Term, 1993

CHARLES K. ELDER,

Petitioner,

v.

R.D. HOLLOWAY, AND OTHER UNKNOWN EMPLOYEES AND AGENTS, Individually, And In Their Official Capacity As Police Officers For The Ada County Sheriff's Office; VAUGHN KILLEEN As Sheriff Of Ada County; And The COUNTY OF ADA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENTS

JAMES J. DAVIS
Attorney at law
960 Broadway, Suite 302
P. O. Box 8126
Boise, Idaho 83707
Telephone: (208) 336-3244

Counsel of Record for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

48 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether in 1987 there was clearly established law of which an arresting officer should have known that a law enforcement officer, with probable cause and a certified arrest warrant from another state, needed an arrest warrant issued in his home state to surveil a personal residence with the intent of arresting a suspect outside the residence?

2. Was the Court of Appeals correct in placing upon the plaintiff in a civil rights action the burden of showing clearly established law when responding to a government official's motion for summary judgment?

3. What standard of review is to be applied by a Court of Appeals in reviewing a district court's grant of qualified immunity?

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

A. STATEMENT OF FACTS 1

B. DECISIONS BELOW 2

SUMMARY OF THE ARGUMENT 4

ARGUMENT 6

I. HOLLOWAY IS ENTITLED TO QUALIFIED IMMUNITY BECAUSE A REASONABLE OFFICER COULD HAVE BELIEVED ELDER'S ARREST TO BE LAWFUL, IN LIGHT OF CLEARLY ESTABLISHED LAW AND THE INFORMATION HOLLOWAY POSSESSED 6

A. The Court should determine whether Holloway is entitled to qualified immunity before even considering the panel decision 6

B. Supreme Court precedent establishes that Holloway has qualified immunity 8

1. Qualified Immunity in the Supreme Court 8

2. The information available to the arresting officer 12

3. Legal rules governing the arrest 13

4. The Ninth Circuit's decision in *United States v. Al-Azzawy* does not affect Holloway's qualified immunity 17

TABLE OF CONTENTS – Continued

Page

II. WHEN THE AFFIRMATIVE DEFENSE OF QUALIFIED IMMUNITY IS RAISED IN A CIVIL RIGHTS ACTION BY PRETRIAL MOTION, THE PLAINTIFF HAS THE BURDEN OF SHOWING THAT THE LEGAL RULES CONCERNING THE RIGHT ALLEGEDLY VIOLATED WERE CLEARLY ESTABLISHED 21

III. THE PANEL PROPERLY EXERCISED ITS DISCRETION IN DISREGARDING LEGAL AUTHORITIES NOT CITED TO THE DISTRICT COURT 28

A. The panel decision placed in context of the underlying record is a narrow one 28

B. Even if the panel decision is construed more broadly, it is a logical extension and reconciliation of this Court's qualified immunity cases and burden of proof 31

C. Supreme Court precedent supports deferential review of qualified immunity 34

D. Public policy considerations support deferential review of qualified immunity 38

CONCLUSION 41

TABLE OF AUTHORITIES

Page

CASES:

Anderson v. Creighton, 483 U.S. 635 (1987) ..... *passim*

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 27

Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971) 10, 11

Bothke v. Fluor Engineers & Constructors, Inc., 739 F.2d 484 (9th Cir. 1984) 25

Butz v. Economou, 438 U.S. 478 (1978) 27, 32, 39, 40

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 27

Cooper v. Sheriff, Lubbock County, Texas, 929 F.2d 1078 (5th Cir. 1991) 23

Cross v. City of Des Moines, 965 F.2d 629 (8th Cir. 1992) 23

Davis v. Scherer, 468 U.S. 183 (1984) ..... *passim*

Easton v. Sundram, 947 F.2d 1011 (2d Cir. 1991) 23

Gomez v. Toledo, 446 U.S. 635 (1980) 22

Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949) 28

Harlow v. Fitzgerald, 457 U.S. 800 (1982) ..... *passim*

Hilliard v. City and County of Denver, 930 F.2d 1516 (10th Cir. 1991) 23

Hunter v. Bryant, 116 L.Ed.2d 589 (1991) 8

Kamen v. Kemper Financial Services, 114 L.Ed.2d 152 (1991) 30

Lopez v. Robinson, 914 F.2d 486 (4th Cir. 1990) 23

Malley v. Briggs, 475 U.S. 335 (1986) 8, 9, 20, 23, 25

Miller v. Fenton, 474 U.S. 104 (1985) 36

TABLE OF AUTHORITIES – Continued

Page

Mitchell v. Forsyth, 472 U.S. 511 (1985) 19, 27, 37

Nicholson v. Georgia Department of Human Resources, 918 F.2d 145 (11th Cir. 1990) 23

Oates v. Sobolevitch, 914 F.2d 428 (3d Cir. 1990) 22

Payton v. New York, 445 U.S. 573 (1980) 14

Pierce v. Underwood, 487 U.S. 552 (1988) ..34, 35, 36, 37, 38

Pierson v. Ray, 386 U.S. 547 (1967) 8, 9, 20

Pounds v. Griepenstroh, 970 F.2d 338 (7th Cir. 1992) 23

Procunier v. Navarette, 434 U.S. 555 (1978) 6, 7, 23

Quintero de Quintero v. Aponte-Roque, 974 F.2d 226 (1st Cir. 1992) 23

Rich v. City of Mayfield Heights, 955 F.2d 1092 (6th Cir. 1992) 23

Scheuer v. Rhodes, 416 U.S. 232 (1974) 8, 9

Siegert v. Gilley, 114 L.Ed.2d 277 (1991) 6, 7, 23, 26

Singleton v. Wulff, 428 U.S. 106 (1976) 34

State v. Morse, 480 A.2d 183 (N.H. 1984) 15

United States National Bank of Oregon v. Independent Ins. Agents, 113 S.Ct. 2173 (1993) 7, 33

United States v. Al-Azzawy, 784 F.2d 890 (9th Cir. 1986) 17, 18, 19, 29, 30

United States v. Botero, 589 F.2d 430 (9th Cir. 1979) ..15, 16

United States v. Santana, 427 U.S. 38 (1976) 15

United States v. Watson, 423 U.S. 411 (1976) 14

Wyatt v. Cole, 118 L.Ed.2d 504 (1992) 11

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

28 U.S.C. § 2412(d) 34

42 U.S.C. § 1983 7

MISCELLANEOUS:

L. Carey, Quick Termination of Insubstantial Civil Rights Claims: Qualified Immunity and Procedural Fairness, 38 *Vanderbilt Law Review* 1543, 1568-1570 (1985) 26

S. Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983* §§ 8.08 and 8.19 (3d ed. Supp. 1986) 18

S. Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983* § 8.08 (3d ed. 1986) 38

STATEMENT OF THE CASE

A.

STATEMENT OF FACTS

After receiving an informant's tip that Petitioner Charles K. Elder ("Elder") was residing in Boise, Idaho, having fled the State of Florida because of two pending felony charges (aggravated battery and receiving stolen property), Respondent R. D. Holloway ("Holloway") attempted to arrest him on April 27, 1987. The information provided to Holloway included that Elder was very dangerous, had beat two individuals with pool cues in Florida, was in possession of firearms, and would "shoot it out with law enforcement" if an attempt was made to arrest him. R. 27, Ex. 1.

On the morning of April 27, 1987, Holloway received certified copies of the felony warrants from the State of Florida. An attempt was then made to arrest Elder outside at his job site but Elder had been informed by his employer that law enforcement was looking for him. JA 2-3. Holloway and other officers then proceeded to Elder's brother's house, where Elder was apparently residing, with the intent to surveil the residence and arrest Elder once he exited. JA 3. The surveillance was discovered by Elder's brother when he left the home on horseback. Elder's brother advised Holloway that Elder had access to numerous guns in the house. R. 27 (Deposition of R. D. Holloway, pp. 94, 99-100). Elder's brother assisted Holloway by talking on the telephone with Elder. Holloway overheard Elder's brother tell him: "There are dozens of cops out here with shotguns and rifles, and you

can't shoot it out with them." "You can't win." R. 27 (Deposition of R. D. Holloway, p. 108).

During the course of the telephone conversations between Elder and his brother Holloway learned that Elder may have had an epileptic seizure. Holloway instructed Elder to exit the residence on his hands and knees to avoid injury from falling. Elder exited the residence on foot, had a seizure on the front stoop, fell and was injured. He was then arrested.

B.
DECISIONS BELOW

The district court on cross motions for summary judgment granted Holloway's motion on qualified immunity. The court denied plaintiff's motion for partial summary judgment which sought to have the court declare that Elder's warrantless arrest was unconstitutional. Holloway had similarly moved for summary judgment on the constitutionality of the arrest on numerous grounds, including a warrant was not required; in the event it was required, exigent circumstances existed. The district court held that there were genuine issues of material fact precluding summary judgment for either party on the constitutionality of the arrest.

Both in asserting that the arrest was unconstitutional and in opposing Holloway's motion on qualified immunity, Elder advanced a "constructive entry" theory. Based upon state court decisions from courts outside of Idaho, Elder argued that he had constructively been arrested inside the house. The district court held that the case law

was not clearly established as to whether under the circumstances a reasonable officer would have known that a warrant was required. JA 18.

Elder appealed only the qualified immunity issue to the Ninth Circuit. He relied upon the same case authorities cited to the district court. During the course of oral argument the panel identified a case that was arguably on point. Elder's counsel sought to distinguish the case.

The panel affirmed the district court. JA 24. The panel then issued an Amended Opinion which again affirmed the district court. In the Amended Opinion the panel did not reach the merits of the qualified immunity issue except to say that the language in the case which it had located, and which Elder attempted to distinguish, was dicta, and that the actual holding of the case was not entirely advantageous to Elder. JA 44. The panel, relying upon Supreme Court and Ninth Circuit precedent held Elder had the burden of showing clearly established law at the district court. It further held it would affirm because Elder failed to advance clearly established law at the district court, attempted to distinguish the one case the panel had located, and the case the panel located did not clarify whether there was clearly established law. JA 44-45.

Elder requested a rehearing and suggested *en banc* consideration which was denied. JA 46.

SUMMARY OF THE ARGUMENT

The question presented by Elder begs the issue actually presented by this case: whether a reasonable officer could have believed Elder's arrest to be lawful, in light of clearly established law and the information the arresting officer possessed. The Court has recently held that the first inquiry in qualified immunity analysis is whether there has been a showing of a violation of a constitutional right that was clearly established at the time of the arrest. Instead of addressing the merits of the qualified immunity issue, Elder requests the Court to review the Ninth Circuit panel's refusal to consider one case on appeal. This Court need not reach that issue because Elder's arrest did not violate clearly established constitutional rights of which a reasonable officer should have been aware.

Only if Elder overcomes the first inquiry need the Court consider the panel decision. If the Court does address the panel decision, the decision should be affirmed because it is consistent with the Court's qualified immunity decisions and supports the policies underlying qualified immunity. The panel held: (1) Elder failed to meet his burden of showing a violation of a constitutional right; and (2) under the circumstances, the panel would not consider a case Elder had failed either to cite to the district court or to rely upon in the Ninth Circuit once the case was brought to his attention.

The panel decision with respect to Elder's burden of showing a violation of a constitutional right is consistent with this Court's recent qualified immunity decisions. In addition, the vast majority of Circuit Courts of Appeals

have specifically placed the burden of proof of establishing a clear constitutional right upon the plaintiff. In light of the plaintiff's burden, the explicit recognition in qualified immunity cases of a desire for early resolution of the qualified immunity issue, and summary judgment standards, a plaintiff must meet the burden by presenting clearly established law *at the time* the question arises in the district court.

The panel decision to disregard one case neither cited to the district court nor relied upon by Elder once brought to his attention is within the panel's discretion. The panel recognized the important factors identified above, and extended and reconciled them in deciding not to consider the impact one case had on the clearly established law question. That decision was within its discretion.

Elder's reading of the panel decision on that point is grossly over-broad. The panel did not hold that in all circumstances it would disregard authority not cited to the district court. Rather, it held under the circumstances of this case, where the case was not cited, where the case was located by the panel and strategically ignored by plaintiff, and where the case was only arguably on point, it would not be considered. In criticizing the panel opinion, Elder argues that the panel had no discretion to disregard the case. That criticism is incorrect and ignores an appellate court's discretion.

Moreover, the panel decision, even if read more broadly, is the logical extension of the burden of proof being placed upon the plaintiff to show clearly established law. There is precedent supporting deferential

review of the district court's decision. And, public policy considerations underlying qualified immunity support deferential review.

ARGUMENT

I.

HOLLOWAY IS ENTITLED TO QUALIFIED IMMUNITY BECAUSE A REASONABLE OFFICER COULD HAVE BELIEVED ELDER'S ARREST TO BE LAWFUL, IN LIGHT OF CLEARLY ESTABLISHED LAW AND THE INFORMATION HOLLOWAY POSSESSED.

A.

The Court should determine whether Holloway is entitled to qualified immunity before even considering the panel decision.

In *Siegert v. Gilley*, 114 L.Ed.2d 277 (1991) the Court granted certiorari to address the appropriate "analytical structure" when qualified immunity is raised by a defendant. The first inquiry, according to Chief Justice Rehnquist, is a determination of whether the plaintiff asserts the violation of a clearly established right. *Id.* at 286. Thus, in affirming a dismissal of the plaintiff's complaint for failure to allege the violation of a clearly established right, the Court did not reach the procedural issue – a heightened pleading standard – which the Court of Appeals had applied.

Even before announcing the clarified analytical structure in *Siegert*, the Court had taken the same approach in *Procunier v. Navarette*, 434 U.S. 555 (1978). In *Procunier*, the

district court had granted summary judgment to defendant prison officials on a prisoner's claim that he had a constitutional protection for his outgoing prison mail. The Court of Appeals reversed summary judgment on three separate grounds. This Court granted certiorari on one of the grounds – whether alleging negligent violation of a constitutional right is sufficient for purposes of 42 U.S.C. § 1983. The Court did not, however, reach that issue. Instead, the Court went directly to the qualified immunity issue of whether there were clearly established rights protecting prisoners' outgoing mail, *Id.* at 565, and specifically acknowledged it did not address the standard of conduct necessary to assert a § 1983 claim. *Id.* at 566 n.14.[1]

Since a resolution of the qualified immunity issue in favor of Holloway is dispositive, the Court need not consider the "procedural issues" (Brief for the American Civil Liberties Union on Amicus Curiae in Support of Petitioner, p. 7) raised by the panel decision. In keeping with *Siegert's* analytical structure and *Procunier's* earlier analysis, the Court should first address the issue of whether Elder has stated the violation of a clearly established constitutional right.

---

[1] *Procunier* also demonstrates that the merits of the qualified immunity issue is a subsidiary question fairly included within the question identified by petitioner. Sup. Ct. R. 14.1(a); *United States National Bank of Oregon v. Independent Ins. Agents*, 113 S.Ct. 2173 (1993).

B.

Supreme Court precedent establishes that Holloway has qualified immunity.

1. Qualified Immunity in the Supreme Court.

In a long line of cases, beginning with *Pierson v. Ray*, 386 U.S. 547 (1967) the Court has recognized and applied qualified immunity to law enforcement officers who have allegedly violated Fourth Amendment protections. *Malley v. Briggs*, 475 U.S. 335 (1986); *Anderson v. Creighton*, 483 U.S. 635 (1987); and *Hunter v. Bryant*, 116 L.Ed.2d 589 (1991). In so doing, the Court recognized in *Davis v. Scherer*, 468 U.S. 183, 196 (1984):

> . . . [P]olice officers . . . who enjoy only qualified immunity, routinely make close decisions in the exercise of the broad authority that necessarily is delegated to them. Those officials are subject to a plethora of rules, "often so voluminous, ambiguous, and contradictory, and in such flux that officials can only comply with or enforce them selectively." (citation omitted) In these circumstances, officials should not err always on the side of caution. "[O]fficials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred would be futile or constitute virtual abdication of office." (citation omitted)

Law enforcement officers must make difficult decisions in the field on a daily basis. *Cf. Scheuer v. Rhodes*, 416 U.S. 232, 246-247 (1974). The Fourth Amendment presents some of the most difficult decisions officers must face. *Anderson, supra*, at 644. Often those decisions place officers in situations where a choice must be made

between being charged with dereliction of duty if they do not act or suit under § 1983 if they do. A "policeman's lot is not [supposed to be] so unhappy." *Pierson, supra*, at 555.

But, qualified immunity is intended to protect ". . . all but the plainly incompetent or those who knowingly violate the law." *Malley, supra*, at 341. This is so because at the heart of immunity for law enforcement officers is the public interest in enforcing laws and protecting the public, *Scheuer, supra*, at 241, and the related danger that the threat of personal liability would deter officers from protecting the public interest. *Id.* at 240.

With these important policy considerations in mind, the Court has established a qualified immunity standard that is intended to protect the public from officers who with objective knowledge violate clearly established constitutional or statutory rights. The "modern" seminal cases in defining the standard of qualified immunity for law enforcement officers are *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Anderson, supra*. In *Harlow*, the objective/subjective test was dropped in favor of an objective test which is intended to promote early dismissal of insubstantial claims. *Id.* at 818.[2] That goal explicitly recognized the public policy identified in *Scheuer* of not wanting to deter officers in performing their functions. *Id.* at 816 and 818.

---

[2] More will be said about this important public policy consideration in Part II of this brief.

The qualified immunity standard enunciated in *Harlow* is that government officials are immune if their conduct does not violate clearly established constitutional or statutory rights:

> . . . Government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id. at 818.

While *Harlow* established the objective standard, *Anderson* defined it. In *Anderson* an FBI agent conducted a warrantless search of a home on the mistaken belief that a suspected bank robber may be present. When the home owner sued in a *Bivens*[3] action alleging violation of the Fourth Amendment, the district court granted the agents' motion for summary judgment holding that the search was lawful, the agents had probable cause to search, and the failure to obtain a warrant was justified by exigent circumstances. The Court of Appeals reversed on the basis that there were genuine issues of material fact precluding summary judgment on the legality of the search. In addition, the Court of Appeals reversed summary judgment on qualified immunity on the basis that the home-owner's Fourth Amendment rights were clearly defined.

---

[3] *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

This Court reversed and remanded the qualified immunity issue. In so doing the Court identified the Court of Appeals' error on the qualified immunity issue as too generally defining the relevant legal rules to be applied in assessing whether a clearly established right had been violated. The Court of Appeals had identified the general Fourth Amendment right to be secure in one's home as the clearly established right. That inquiry was over-broad. The inquiry should have been more particularized: ". . . the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640. The Court of Appeals' error was it did not consider the FBI agent's argument that the law was not clearly established under the circumstances within which he was confronted at the time. *Id.* at 640-641.

Importantly, the Court recognized, as it had in a number of earlier cases, that a law enforcement officer has qualified immunity if he reasonably – but mistakenly – concludes there is probable cause or exigent circumstances. *Id.* at 641. Qualified immunity is not determined by whether a constitutional violation occurred, but whether the officer under the circumstances presented – the information he possesses – "could have believed" his conduct to be lawful in light of clearly established law. *Id.* at 641. Indeed, qualified immunity analysis assumes a constitutional violation, but immunizes the government official from damages. *Cf. Wyatt v. Cole*, 118 L.Ed.2d 504, 518-519 (1992) (Kennedy, J. concurring).

With that background the question of whether Holloway is entitled to qualified immunity, as the district court held and the Court of Appeals affirmed, can be assessed.

The inquiry is whether a reasonable officer would have believed Elder's arrest to be lawful (a) based upon the information Holloway had and (b) in light of clearly established law. *Anderson, supra,* at 641.

2. The information available to the arresting officer.

The analysis begins with the information Holloway had at the time of Elder's arrest. Holloway had an informant's tip made to a city police officer on April 21, 1987. Holloway was able to verify the information in the tip. The informant advised that Elder was wanted in Florida on felony charges of aggravated battery and dealing in stolen property; he was living with his brother in Boise, Idaho; he had possession and access to guns; he had threatened to shoot it out with police if they attempted to arrest him; and he was extremely dangerous.

Acting on that information, Holloway learned that Elder was employed by a local tree cutting service and that he worked outside at that employment. After having made contact with Florida authorities earlier, Holloway received certified copies of the Florida warrants of arrest on the morning of April 27, 1987. He then contacted Elder's employer and advised that an attempt to arrest Elder at the job site would be made. Unfortunately, the employer informed Elder of his potential arrest. He and his brother left the job site and went to the brother's home.

When Holloway arrived at the job site he was informed that Elder had left and that he had a gun in his

possession. Holloway then went to Elder's brother's home to surveil the residence. Holloway did not want to approach the house because of the information he had that Elder was dangerous and would "shoot it out" with law enforcement. Thus, the residence was to be surveiled until Elder left and could be arrested in an open place with less risk to innocent persons.

Elder's brother, who had been at the residence, left on horseback and discovered the officers' presence. He told the officers that Elder was in the house, had access to numerous firearms, and would resist arrest. Holloway attempted to reach Elder by telephone to see if he would surrender, but he did not answer the phone. Only after Elder's brother, by use of a loudspeaker, made contact with Elder did any communication occur. Elder reported he had had an epileptic seizure. Holloway asked Elder to crawl outside to avoid physical injury in the event of another seizure. Elder, contrary to Holloway's instructions, exited the house on foot, had a seizure on the stoop, landed on his head and was injured. He was then arrested.

3. Legal rules governing the arrest.

As noted above, the second inquiry in qualified immunity analysis is whether the legal rules involved were clearly established. The specific legal rules governing Elder's arrest under the circumstances were not clearly established and Holloway is entitled to qualified immunity.

At either end of the broad Fourth Amendment spectrum are two clearly established principles: (1) a warrant is necessary to arrest an individual in a personal residence absent exigent circumstances, *Payton v. New York*, 445 U.S. 573 (1980), and (2) a warrant is not necessary to arrest in a public place where there is probable cause, *United States v. Watson*, 423 U.S. 411 (1976). With those principles neither Elder nor Holloway disagree. But, the legal principles become less clear toward the middle of the Fourth Amendment spectrum.[4]

Elder's arrest falls in the middle of the spectrum where the legal rules are not clearly established. Holloway did not enter the house to arrest Elder. He physically placed Elder under arrest outside the house after Elder exited. There is no dispute Holloway had probable cause to arrest – the only issue is whether a warrant was necessary under the circumstances.

In an effort to establish that there was clearly established law, Elder cited state court cases to the district court. JA 12. Plaintiff did not cite any Idaho or Ninth Circuit cases to the district court. Elder claimed that the state court cases created a theory of "constructive entry." That is, even though Holloway did not physically cross the threshold of the doorway to the house, he had constructively done so by using the telephone and loudspeaker. Thus, Elder claimed a warrant was necessary because the arrest occurred in the house.

---

[4] "We have frequently observed, and our many cases on the point amply demonstrate, the difficulty of determining whether particular searches or seizures comport with the Fourth Amendment." *Anderson, supra*, at 644.

Apart from the obvious problem of asserting that state court decisions could put a law enforcement officer in another state on notice of legal rights, none of the cases Elder cited address the same situation which arose here. None of the cases involved the use of surveillance or the use of a telephone or bullhorn to contact someone inside a house. Each of the cases involved an officer knocking on the suspect's door and then arresting the suspect. Thus, the cases were factually distinguishable. More importantly, none of the cases could fairly be said to have put Holloway on notice that his conduct violated clearly established rights.

Further, the cases cited by Elder were not only factually distinguishable, but also they were in conflict with Ninth Circuit precedent. In *United States v. Botero*, 589 F.2d 430 (9th Cir. 1979), *cert. denied*, 441 U.S. 944 (1979), the Court of Appeals, following *United States v. Santana*, 427 U.S. 38 (1976), held that a warrant was not required where law enforcement officers went to a suspect's apartment, knocked on the door, and arrested the suspect at the doorway. Indeed, one of Elder's state court cases acknowledged that there was a split of authority as to whether a warrant was required under the circumstances; it further acknowledged that the Ninth Circuit had resolved the issue in favor of the law enforcement officers. The state court simply chose not to follow *Botero*. *State v. Morse*, 480 A.2d 183 (N.H. 1984). Elder's other cases were similarly distinguishable: they resolve the warrant requirement issue contrary to *Botero*.

Under the circumstances there was no law presented – let alone clearly established law – which would have put an objective law enforcement officer on notice that he

could not surveil Elder's residence to arrest him when he exited. Nor was there law presented which would put a reasonable officer on notice that a warrant was necessary to contact someone inside a residence by telephone or bullhorn. Certainly, use of a bullhorn or telephone is less intrusive than knocking on the front door and arresting the suspect. The latter conduct had been sanctioned by the Ninth Circuit in *Botero*. Further, since Elder was regarded as extremely dangerous it would not have been prudent for officers to approach the front door.

The "contours of the law" governing whether a warrant was necessary under the circumstances simply was not clear at the time of Elder's arrest. The district court, in determining that Holloway was entitled to qualified immunity, stated:

> . . . The defendants in this case could not have been violating plaintiff's clearly established rights when the law was far from certain as to when a constructive entry occurs, and there exists no official policy relating to getting a suspect out of his home by telephone or police loudspeaker. *There is no way that any individual officer, under the circumstances of this case, could have known that he was violating another's clearly established constitutional rights when those rights were not yet clearly established.* Until the law is better defined, it appears to this court that officers in similar circumstances could make an arrest outside the home if they in good faith believe that they could effectuate the arrest without violating any clearly established constitutional rights. The officers in this case clearly acted reasonably under the circumstances as it was their understanding of the law, and it was

> provided for in Ada County's arrest and custody policy, that as long as they made the arrest outside the home, they could make the arrest without an Idaho arrest warrant. It appears from the record that the officers reasonably believe that their actions were constitutional; therefore, no liability attaches to their actions.
>
> JA 18-19.

The district court was correct. The cases relied upon by Elder did not meet the *Harlow* standard. The cases did not demonstrate clearly established constitutional rights of which a reasonable person would have known.

4. The Ninth Circuit's decision in *United States v. Al-Azzawy* does not affect Holloway's qualified immunity.

As the Court is now well aware, the Court of Appeals located a Ninth Circuit case, *United States v. Al-Azzawy*, 784 F.2d 890 (9th Cir. 1986), *cert. denied*, 476 U.S. 1144 (1986) which Elder did not offer to the district court, but which arguably should have been presented. *Al-Azzawy* does not alter the result that Holloway is entitled to qualified immunity[5] because the case would not apprise a reasonable officer that Elder's arrest may be unlawful.

In *Al-Azzawy* the Court of Appeals found a warrantless arrest under facts similar to Elder's to be lawful

---

[5] Whether *Al-Azzawy* should be considered on appeal is addressed in Parts II and III of this brief. In this part of the brief, *Al-Azzawy* is addressed to demonstrate that even if it had been presented to the district court, it would not alter the result. Holloway would still be entitled to qualified immunity.

under exigent circumstances. While reaching that conclusion, the court held that surrounding the trailer, with the suspect inside, did constitute an arrest inside the trailer. But, the court went on to hold that under the circumstances – circumstances similar to this case – the arrest and subsequent search were lawful. Further, the court noted it was "a close question" whether the warrantless arrest was lawful. *Id.* at 894.

A fair reading of the entire case simply would not apprise a reasonable officer that Elder's arrest would violate Fourth Amendment rights when Al-Azzawy's arrest, under the same circumstances, did not violate such rights. At best, the officer would only know that Elder's arrest was a "close question" – one that falls in the middle of the Fourth Amendment spectrum.

This conclusion is supported by the panel decision which refers to the language in *Al-Azzawy* concerning the place of arrest as dicta, JA 34-35, 44; by Elder's counsel's attempt to distinguish the case, JA 35, n.1, 44, and by Elder's counsel's and the district court's inability to locate the case.[6] Where, as here, a lawyer and a judge were not aware of a case and a three-judge Court of Appeals calls the case arguably applicable and dicta, an officer cannot be charged with knowledge that the case constituted clearly established law.[7]

---

[6] Law enforcement officers are not expected to have the same understanding of the law as trained lawyers. *Davis v. Scherer, supra,* at 197 n.13.

[7] S. Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983* §§ 8.08 and 8.19 (3d ed. Supp. 1986). In commenting upon the panel's decision in Elder, Professor Nahmod states: "Indeed, the fact that neither counsel nor the district court timely found a Ninth Circuit precedent closely on point strongly suggested that the defendant police officer did not violate clearly settled Fourth Amendment law."

Remember, the inquiry for qualified immunity is not whether a constitutional right was violated, but whether the officer should have known he was violating a clearly established right. *Mitchell v. Forsyth,* 472 U.S. 511, 529 n.10 (1985). ". . . [W]here there is legitimate question whether an exception to the warrant requirement exists it cannot be said that a warrantless . . . [arrest] violates clearly established law." *Id.* at 536 n.12. This is especially true where, as here, the precedent upon which plaintiff relies declares the validity of the legal rule to be a "close question." *Al-Azzawy, supra,* at 894.

There is nothing about *Al-Azzawy* which would prevent a reasonable officer from believing Elder's arrest was lawful. Nor from *Al-Azzawy* could it be fairly said that Holloway should have known " . . . that the law forbade [his] conduct . . ." *Harlow, supra,* at 18. As was succinctly stated in *Anderson,* under circumstances very similar to those presented here:

> It simply does not follow immediately from the conclusion that it was firmly established that warrantless searches not supported by probable cause and exigent circumstances violate the Fourth Amendment that Anderson's search was objectively legally unreasonable. We have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those

officials – like other officials who act in ways they reasonably believe to be lawful – should not be held personally liable. *See Malley, supra,* at 344-345. The same is true of their conclusions regarding exigent circumstances.

Anderson, supra, at 641.

In the final analysis, Holloway is entitled to qualified immunity because he acted reasonably. He attempted to arrest Elder outside the house. It was only after efforts to arrest him at a job site had failed, and the officers conducting the surveillance at his brother's home were discovered, that any contact inside the home was attempted. If the officers had allowed Elder's brother to return to the house and they had left the scene, they may have been charged with dereliction of duty because Elder would have posed a threat to the public. Holloway's alternative – attempting to contact Elder in hopes that he would surrender – might, according to Elder, expose Holloway to personal liability. A law enforcement officer's lot is not supposed to be "so unhappy." *Pierson, supra,* at 555. The law was not so clearly established that Holloway would have known his actions might violate Elder's rights. The Court should affirm the Court of Appeals on the basis that Holloway has qualified immunity.

II.

WHEN THE AFFIRMATIVE DEFENSE OF QUALIFIED IMMUNITY IS RAISED IN A CIVIL RIGHTS ACTION BY PRETRIAL MOTION, THE PLAINTIFF HAS THE BURDEN OF SHOWING THAT THE LEGAL RULES CONCERNING THE RIGHT ALLEGEDLY VIOLATED WERE CLEARLY ESTABLISHED.

The panel, in affirming summary judgment to Holloway on the qualified immunity issue, did so, in part, because Elder had not met his burden of showing that a clearly established right had been violated. Relying upon *Davis v. Scherer, supra,* and Circuit precedent dating back to 1984, the panel held Elder had the burden to establish that a clear right had been violated. JA 36 n.2. He failed to meet that burden when the only law he presented in opposition to Holloway's motion for summary judgment did not identify a clearly established right.[8]

The panel held that to meet the burden plaintiff must identify the "universe of relevant statutory or decisional law" to enable the Court to determine whether there was clearly established law. JA 39. In other words, when defendant files a motion to dismiss or motion for summary judgment, plaintiff " . . . must show that the particular facts of his case support a claim of clearly established right, and he loses if he does not come forward with statutory or decisional law on which the court

---

[8] "No case Elder identified clearly established whether an arrest takes place inside or outside the home, when the suspect is inside but is summoned outside by law enforcement officers who have surrounded the premises." JA 35.

can find that the constitutional right was clearly established." JA 39.

There is nothing unique or novel about placing the burden on the plaintiff to show that a clearly established constitutional right has been violated.[9] All, but one,[10] of

---

[9] Neither Brief of Petitioner nor either of the *amicus curiae* briefs filed in support of Petitioner provides the Court with any authority to the contrary. In fact, none of the briefs devotes much attention to the issue. Brief of Petitioner, pp. 28-30, challenges the panel's reliance upon *Davis*. But as addressed later in n.12 of this brief, the arguments are easily refuted. The American Bar Association's brief, p. 7, calls placing the burden upon the plaintiff "jurisprudently unsound," but the brief does not address qualified immunity law. The American Civil Liberties Union's ("ACLU") brief, like Elder's brief, criticizes the panel's reliance upon *Davis*. Unlike Elder, the ACLU acknowledges in qualified immunity cases that " . . . Plaintiff may prevail only if he convinces the court that his claim is well-grounded in law," (p. 5) " . . . The plaintiff also must 'show' that . . . [plaintiff's] . . . constitutional rights were clearly established," (p. 12) and " . . . Plaintiff may prevail only if he establishes that his claim is well-grounded in law." (p. 13). Thus, while ACLU disagrees with the panel's reliance on *Davis*, it acknowledges in the context of qualified immunity that the plaintiff must make a showing. The American Bar Association does not address qualified immunity. None of the briefs provide the Court with any authority that the burden should not be on the plaintiff.

[10] *Oates v. Sobolevitch*, 914 F.2d 428 (3d Cir. 1990). *Oates* relied upon *Gomez v. Toledo*, 446 U.S. 635 (1980) to hold that defendant had the burden to prove entitlement to qualified immunity. The Third Circuit's reliance upon *Gomez* is misplaced. *Gomez* held the burden of pleading qualified immunity is on the defendant, but it did not address burden of proof. *Id.* at 642 (Rehnquist, J., concurring); *Harlow v. Fitzgerald, supra*, at 815 n.24.

the Courts of Appeals have placed the burden of establishing the violation of a clear constitutional right upon the plaintiff.[11] Further, placing the burden on plaintiff to show violation of a clearly established right is consistent with this Court's qualified immunity decisions and the policies underlying qualified immunity and summary judgment.

A number of the Court's decisions have addressed the burden in qualified immunity cases. Those decisions place the burden squarely on the plaintiff. For instance, Chief Justice Rehnquist, writing for the majority in *Siegert*, noted that Siegert both failed to *allege* the violation of a clearly established right, and " . . . failed to *establish* the violation of any constitutional right at all." *Id.*, 114 L.Ed.2d at 287 (emphasis added). Similarly, in *Malley v. Briggs, supra*, Justice Powell, in concurring and dissenting, wrote that summary judgment was appropriate because ". . . respondents failed to show . . ." that the decision to request a warrant was not objectively reasonable. In addition, in *Procunier, supra*, at 564, the Court

---

[11] *Quintero de Quintero v. Aponte-Roque*, 974 F.2d 226 (1st Cir. 1992); *Rich v. City of Mayfield Heights*, 955 F.2d 1092 (6th Cir. 1992); *Pounds v. Griepenstroh*, 970 F.2d 338 (7th Cir. 1992); *Cross v. City of Des Moines*, 965 F.2d 629 (8th Cir. 1992); *Easton v. Sundram*, 947 F.2d 1011 (2d Cir. 1991); *Cooper v. Sheriff, Lubbock County, Texas*, 929 F.2d 1078 (5th Cir. 1991); *Hilliard v. City and County of Denver*, 930 F.2d 1516 (10th Cir. 1991); *Siegert v. Gilley*, 895 F.2d 797 (D.C. Cir. 1990), *affirmed on other grounds*, 114 L.Ed.2d 277 (1991); *Lopez v. Robinson*, 914 F.2d 486 (4th Cir. 1990); and *Nicholson v. Georgia Department of Human Resources*, 918 F.2d 145 (11th Cir. 1990).

specifically cited the cases offered by plaintiff and concluded that the cases did not establish a clear constitutional right.

In *Davis v. Scherer, supra,* the Court very plainly places the burden of showing clearly established law on the plaintiff. Three times in *Davis,* Justice Powell, writing for the majority, stated that the plaintiff had the burden to demonstrate a violation of his clearly established rights: "We conclude that the district court correctly held that *appellee has demonstrated no violation* of his clearly established constitutional rights," *Id.* at 193 (emphasis added); "Even defendants who violate constitutional rights enjoy a qualified immunity that protects them from liability for damages *unless it is further demonstrated* that their conduct was unreasonable . . . ," *Id.* at 190 (emphasis added); and "A plaintiff who seeks damages for violation of constitutional or statutory rights *may overcome* the defendant official's qualified immunity *only by showing* that those rights were clearly established at the time of the conduct at issue." *Id.* at 197 (emphasis added). With those statements from Justice Powell, it is difficult to comprehend, notwithstanding Judge Kozinski's dissent[12] (JA 584-587),

---

[12] Judge Kozinski criticizes the panel's reliance on *Davis* on four grounds. Each of the criticisms can easily be addressed. First, he states that the panel should not have relied on language in *Davis* which came from one paragraph " . . . dangling at the end of . . . [the decision]." JA 51. As noted above, Justice Powell stated three times in the decision that the burden was on plaintiff. Second, Judge Kozinski states that if the Court had intended to make a drastic change in qualified immunity law it would have used clearer language. JA 51. The language speaks for itself – it is very clear that Justice Powell was requiring the plaintiff to make a showing of why he thought he was entitled to

how *Davis* could not be construed as placing the burden upon plaintiff.

Moreover, as qualified immunity has evolved in the Court, there is only one way to demonstrate clearly established rights: Point to "legal rules" that were clearly established at the time the conduct occurred. *Anderson, supra,* at 639. Plaintiff must bear that burden because it is plaintiff that both asserts a violation of rights and under the qualified immunity standard asserts the law was clearly established such that a government official should

---

sue. If the language in *Davis* was not clear to some, Justice Powell made it entirely clear two years later in *Malley* when he wrote that summary judgment should have been granted to government officials because plaintiff "failed to show" that the decision to request a warrant was not objectively reasonable. *Id.* at 347. Third, Judge Kozinski argues *Davis* could not mean what the panel concluded because no court perceived its meaning until the panel did. The argument ignores Ninth Circuit precedent which placed the burden on plaintiff as early as 1984, *Bothke v. Fluor Engineers & Constructors, Inc.,* 739 F.2d 484 (9th Cir. 1984); Amended Opinion, JA 36, and cases from all other Circuits except the Third. Fourth, Judge Kozinski asserts that the panel's reading of *Davis* is inconsistent with *Harlow.* JA 52-53. In fact, however, the panel's reading of *Davis* is entirely consistent with *Harlow. Harlow* held that the objective, legal inquiry in qualified immunity cases is whether the *law* was clearly established such that a government official should know his conduct violated plaintiff's rights. The court remanded the case to the district court to determine whether plaintiff's pretrial showings were sufficient to survive the government official's motion for summary judgment. *Id.* at 819-820. The only relevant pretrial showing after *Harlow* is the legal rules defining the contours of plaintiff's alleged constitutional right. *Anderson, supra,* at 639. Thus, Judge Kozinski's arguments regarding the panel's reliance on *Davis* are without foundation.

have known that he was violating the rights. It would be incongruous to place the burden on the defendant since the defendant generally denies that a right was violated. It would be inconsistent with American jurisprudence to allow a plaintiff to file a suit alleging violation of rights, but not to require plaintiff to show what rights.[13]

Placing the burden on a plaintiff to show clearly established law is not substantially different than placing the burden upon a plaintiff to establish the *prima facie* case under § 1983. Whether the question is viewed as plaintiff's duty to establish the first element of the *prima facie* case (deprivation of a constitutional right) or as plaintiff's duty to counter an affirmative defense (deprivation of a clearly established constitutional right), plaintiff must present a legal basis for his claim. That is the clear import of the Court's holding in *Siegert*: plaintiff must show that he has a basis for his claim.

That the Court has placed the burden of establishing clear constitutional rights on the plaintiff is best borne out in the context of pretrial motion practice. The Court has consistently held that motions to dismiss or motions

---

[13] L. Carey, Quick Termination of Insubstantial Civil Rights Claims: Qualified Immunity and Procedural Fairness, 38 *Vanderbilt Law Review* 1543, 1568-1570 (1985) (burden of proof on clearly established law should rest on the plaintiff). In addition, placing the burden on the court to show clearly established law would violate all principles of American jurisprudence. In our adversarial legal system, the court is a neutral arbiter of disputes. To place the burden upon the court would allow plaintiffs to file a complaint and hope the court could find legal authority to support the claim. The court's function would shift from neutral arbiter to advocate for the plaintiff.

for summary judgment are favored early in cases where qualified immunity is raised. *Hunter v. Bryant, supra,* 116 L.Ed.2d at 595. It is axiomatic that to successfully resist a pretrial motion, plaintiff must present some basis for his claim. In responding to a motion for summary judgment, " . . . plaintiffs may not play dog in the manger. . . . " *Butz v. Economou,* 438 U.S. 478, 508 (1978); *cf. Celotex Corp. v. Catrett,* 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986).[14] If plaintiff cannot "play dog in the manger," and the sole inquiry is one of law, *Mitchell, supra,* at 528, there is only one thing the plaintiff must be charged with: present law – cases or statutes – which supports his claim that the rights allegedly violated were clearly established. Thus, the burden must be on the plaintiff.

Public policy underlying qualified immunity also supports placing the burden on plaintiff. In *Harlow* the Court recognized the deterrent effect of litigation on government officials and the inherent "social costs" of such litigation. *Harlow, supra,* at 814. To reduce the deterrence and social costs, the Court eliminated the subjective component of the qualified immunity standard to encourage resolution of qualified immunity issues in pretrial motions. *Id.* at 815-816. Similarly, placing the burden on plaintiff of showing clearly established law would aid in

---

[14] "In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to meet a showing sufficient to establish existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial." *Celotex, supra,* at 322 (quoting *Anderson v. Liberty Lobby, supra*).

eliminating insubstantial lawsuits, encouraging citizen participation in government, and reducing social costs of litigation. Placing the burden upon plaintiff to establish entitlement to monetary damages would enhance the same goals as did elimination of the subjective component of qualified immunity. As Judge Learned Hand once stated in oft-quoted language:

> As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave undressed the wrong done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. . . .
>
> *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)

Here, too, it is better to protect the innocent officer from the constant dread of retaliation. Logically, and consistent with the policies underlying qualified immunity, the burden of establishing clearly established rights should rest with the plaintiff.

III.

THE PANEL PROPERLY EXERCISED ITS DISCRETION IN DISREGARDING LEGAL AUTHORITIES NOT CITED TO THE DISTRICT COURT.

A.

The panel decision placed in context of the underlying record is a narrow one.

In addition to having addressed the burden of proof when qualified immunity is raised in civil rights actions,

the panel examined a court of appeals' role when plaintiff failed to meet the burden. The panel held under the circumstances of Elder's appeal that it would not consider a case which the panel located and which "arguably" may have affected the result. The panel's decision was within its discretion.

The panel's holding can best be understood in the context in which it arose. In the district court both Elder and Holloway moved for summary judgment. Elder sought partial summary judgment on the grounds that his arrest was unconstitutional. JA 4. Holloway sought summary judgment on two bases: (1) the arrest was constitutional and (2) qualified immunity. JA 5-10. One of the bases upon which Holloway sought summary judgment as to the constitutionality of the arrest was that it was justified by exigent circumstances. JA 6. The district court denied the cross motions on the constitutionality of the arrest on the basis that there were genuine issues of material fact, but it granted summary judgment on qualified immunity. JA 21.

On appeal to the Ninth Circuit, Elder, relying upon the same state law cases he relied upon in the district court, argued only the qualified immunity issue. At oral argument the panel raised the specter of *Al-Azzawy's* effect on the case. Elder's counsel attempted to distinguish *Al-Azzawy*. The reason is clear: *Al-Azzawy* is an exigent-circumstances case – it upheld a warrantless arrest under circumstances similar to this case. If Elder argued *Al-Azzawy* applied, he risked the panel affirming summary judgment to Holloway on the basis that Elder's arrest was justified by exigent circumstances. Rather than take that risk Elder sought to distinguish the case and

rely upon the cases cited to the district court. JA 35 n.1 and accompanying text.

The issue before the panel, then, was should it substitute its judgment for the judgment of an advocate. The panel was not willing to do so.

> Given our adversary system, we are unwilling to say that Elder should be stuck with our take on a case that his counsel thinks is distinguishable, but rather believe that when the plaintiff has the burden of addressing the legal facts necessary to prove that the law was clearly established, the record upon which that determination is made is his call rather than ours.
>
> JA 44.

In the context in which the issue reached the panel, the panel's decision should come as no surprise. If error occurred, Elder invited it. JA 42. The panel certainly had discretion not to correct Elder's error whether the error was law or fact. JA 41 n.4 and accompanying text (providing numerous examples of instances where an appellate court exercises its discretion to not correct error); *cf. Kamen v. Kemper Financial Services*, 114 L.Ed.2d 152, 166 n.5 (1991) (the court has the discretion to deny a party the benefit of favorable legal authority).

The panel's decision specifically stated that the issue presented was a narrow one. JA 32. In defining the issue, the panel attempted to limit its holding to situations where " . . . plaintiff did not present [clearly established law] to the district court or to us on appeal. . . . " JA 32. It further noted that the language in *Al-Azzawy* which may have been helpful to Elder was dicta and that some aspects of the case were not at all helpful to Elder. JA 44.

Under the circumstances the district court's failure to find the case was not error, JA 44, and the panel would not substitute its judgment for that of an advocate. JA 44.

Thus, the panel decision is narrow. It exercised its discretion, in the face of invited error, and chose not to substitute its judgment for Elder's. The panel was within its discretion.

B.

Even if the panel decision is construed more broadly, it is a logical extension and reconciliation of this Court's qualified immunity cases and burden of proof.

The panel noted that while the burden of showing clearly established law had been placed on the plaintiff in the Ninth Circuit since 1984, there had been no discussions reconciling that burden with the concept that whether there was a clearly established right was a legal question. JA 36. The panel could not ignore either principle so it had to reconcile them. Consequently, it held when plaintiff was confronted by a motion for summary judgment on qualified immunity, plaintiff had to come forward with law to support that the law was clearly established. JA 36-37. Further, the panel had to reconcile its role when confronted with a party's failure to meet a burden, or a party's error, and its role in deciding legal questions. JA 40. In light of Elder's error, the panel declared its standard of review to be " . . . whether the district court erred in concluding that the plaintiff failed to meet its burden. . . . " JA 40.

The panel's conclusion is a logical extension of its role on evidentiary matters. Order and Dissents, JA 49

(Kozinski, J. dissenting) (courts of appeals have limited authority to review the factual record before it). Placing the burden upon the plaintiff to show clearly established law requires the plaintiff to come forward with some law when a defendant moves for summary judgment. See Part II of this brief. If plaintiff fails to establish a violation of clearly established rights at that time, placing the burden on the plaintiff is meaningless if the plaintiff can on appeal present additional authorities in support of his position. It would allow a plaintiff to "play dog in the manger," *Butz, supra*, at 508; it would prolong resolution of qualified immunity cases because plaintiff would not have to come forward immediately with a legal basis for his claim; and it would invite litigation against government officials.[15] Moreover, when *Harlow* declared that the inquiry in qualified immunity cases is an objective one intended to encourage early resolution of claims, when *Mitchell* declared that the inquiry in qualified immunity cases was an "essentially legal one" and when it is considered that all but one court of appeals have placed the burden of showing the clearly established right on the plaintiff – the panel's conclusion is entirely logical. Plaintiff must come forward with legal authorities to support his position that there was clearly established law.

Despite the logic of the panel decision, and perhaps because of it, Elder and the two *amicus curiae* which support him, devote virtually their entire briefs to this issue. Elder's principal criticism is that the panel decision

---

[15] The panel identified other policy considerations supporting its decision, including the nature of the "clearly established law inquiry" and its precedential impact. JA 39-40.

limits an appellate court's authority to correct errors of law.[16] Elder, instead, advocates that an appellate court should have no discretion. He would require an appellate court to consider cases which the advocates did not cite and which the advocates chose to distinguish once brought to their attention. A court of appeals would no longer have discretion.[17] In that regard, Elder's position is more limiting of an appellate court's authority than is his interpretation of the panel decision because the court would no longer have discretion.

Elder's position is contrary to the inherent authority a court has to exercise discretion. This Court has consistently held that an appellate court has discretion, and is not duty bound, to consider (or to refuse to consider) matters before it. Most recently, in *United States National Bank of Oregon v. Independent Ins. Agents*, 113 S.Ct. 2173 (1993) the Court held the court of appeals had discretion to consider an issue not raised by the parties. But, the Court declined to decide whether the court of appeals had a duty to decide the issue because " . . . the court's decision to consider the issue was certainly no abuse of its discretion." *Id.* at 2179. The flip side of the Court's pronouncement is, of course, that the court of appeals

---

[16] Brief for Petitioner, p. 8; Brief for the American Bar Association as Amicus Curiae in Support of Petitioner, p. 2; and Brief for the American Civil Liberties Union as Amicus Curiae in Support of Petitioner, p. 4. Since the arguments made in all three briefs are virtually identical, reference in the text of this brief is made only to Elder's brief.

[17] *See*, Brief for Petitioner, p. 14 (even a litigant's error should not deter an appellate court from its "duty" to determine the law) and, p. 16, (courts have "the duty" to consider legal authorities not cited).

had discretion to not consider the issue and was not bound to do so. *Cf. Singleton v. Wulff*, 428 U.S. 106, 121 (1976) ("The matter of what question may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the Courts of Appeals, to be exercised on the facts of individual cases. We announce no general rule.") Consequently, Elder's argument that the panel was duty bound to ignore Elder's error in the district court and at the court of appeals should be rejected.

C.

Supreme Court precedent supports deferential review of qualified immunity.

Further, to the extent the panel decision is read broadly to limit appellate review in all qualified immunity cases, it is not without precedent. Borrowing from Judge Kozinski, Elder refers to the panel decision as novel. Brief for Petitioner, p. 8. It is not. In *Pierce v. Underwood*, 487 U.S. 552 (1988) the Court limited appellate court review of a district court's decision of an essentially legal question.

The issue in *Pierce* was the right to attorneys' fees to successful litigants who challenged a decision by the Secretary of Housing and Urban Development ("HUD"). Under the applicable attorney fee statute, the litigants were entitled to fees " . . . unless the court finds that the position of the United States was substantially justified. . . . " 28 U.S.C. § 2412(d). The district court decided that HUD's decision had not been substantially justified. The Ninth Circuit affirmed that decision under an abuse

of discretion standard. This Court affirmed the court of appeals' decision to use the abuse of discretion standard.

The analysis employed by the Court in *Pierce* in determining that an abuse of discretion standard was appropriate is equally applicable to the qualified immunity issue. The Court looked at three factors to determine what standard of review was appropriate. First, the *Pierce* Court noted that the standard created by the attorney fee statute was whether "the *court* finds" HUD's position to be substantially justified, not whether "the position of the United States was substantially justified." It then concluded that the statute suggested "deference to the district court upon appeal." *Id.* at 559. Similarly, the inquiry in qualified immunity cases places the decision of whether there was clearly established law in the lap of "the *judge*."

> On summary judgment, *the judge* appropriately may determine, not only the currently applicable law, but whether the law was clearly established at the time the action occurred.
>
> *Harlow v. Fitzgerald, supra*, at 818 (emphasis added).

Thus, the language of the statute in *Pierce* requiring the Court to make the decision of whether the government's action was substantially justified is similar to the judicial pronouncement in *Harlow* that the judge is to determine whether there is clearly established law.

Second, the *Pierce* Court considered that the standard of review to apply when there are mixed questions of law and fact often turns on what " . . . judicial actor is better positioned than another to decide the issue in question."

Id. at 559-560 (quoting *Miller v. Fenton*, 474 U.S. 104, 114 (1985)). That consideration supported an abuse of discretion standard of review because whether HUD's position was substantially justified " . . . will turn upon not merely *what was the law*, but what was the evidence regarding the facts." *Id.* at 560 (emphasis added). And, it did not matter, in the *Pierce* Court's analysis, that the district court's decision involved " . . . a judgment ultimately based upon evaluation of the *purely legal issue* governing the litigation." *Id.* at 560 (emphasis added).

The inquiry for qualified immunity is identical: an objective legal issue – whether the law was clearly established at the time of the conduct – is measured against the facts presented by the parties. *Anderson v. Creighton, supra*, at 641 ("The relevant question in the case . . . is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful. . . . ").

As a third, and final consideration, the *Pierce* Court discussed the difference between a decision on the merits of the claim against HUD from the attorney fee question. The attorney fee question looks to what the law was at the time of HUD's conduct. The merits are decided, on the other hand, by what the law is. *Id.* at 561. The import is that the attorney fee question when considered apart from the merits does not warrant *de novo* review for two reasons. First, because it does not " . . . produce the normal law – clarifying benefits that come from an appellate decision on a question of law. . . . " *Id.* at 561. That is so because it is not deciding what the current law is; rather, it is deciding a historical question of what the law was. Second, if the Court found that HUD's action was

not substantially justified, the law of the circuit on the merits would have been reached on an appeal of an attorney fee question. *Id.* at 561.

Again, the last of the three factors identified in *Pierce* supports an abuse of discretion standard of review for qualified immunity. An appeal of the qualified immunity issue apart from the merits does not produce "law clarifying benefits." All that is determined is whether the law was clearly established at the time of the conduct. It does not decide whether a constitutional right was in fact violated or what the current law is.[18] This Court so held in *Mitchell v. Forsyth, supra*, at 529 n.10:

> . . . the legal determination that a given proposition of law was not clearly established at the time the defendant committed the alleged acts does not entail a determination of the "merits" of the plaintiff's claim that the defendant's actions were in fact unlawful.

Further, on appeal of the qualified immunity issue, apart from the merits, an appellate court might find that the law was clearly established. Such a decision might be construed as deciding the merits of the constitutional question, just as a decision on attorney fees in *Pierce* might be construed as passing on the merits.

---

[18] Elder flipflops on this issue. In Brief for Petitioner, p. 13 n.2, Elder acknowledges that an appellate court's decision on what the law was is not on the merits. On the contrary, Elder later argues that a decision on the qualified immunity issue is on the merits. *Id.* at 18 n.3. The latter argument is clearly wrong. For the latter position Elder cites *Mitchell v. Forsyth, supra*. Reliance on *Mitchell* is clearly misplaced. *See Mitchell, supra*, at 529 n.10.

The three reasons identified in *Pierce*, which led the Court to apply an abuse of discretion standard, all equally apply to the qualified immunity issue. The qualified immunity issue, like the issue in *Pierce*, involves " . . . multifarious, fleeting, special, narrow facts that utterly resist generalization. . . . " *Id.* at 561-562. Just as there is no need to employ a *de novo* review in determining what the law was in *Pierce*, there is no reason to employ *de novo* review to determine what the law was on the qualified immunity issue. Moreover, despite Elder's arguments to the contrary,[19] there is nothing about the qualified immunity inquiry being a "legal one," that specifically makes it subject to *de novo* review.[20] The *Pierce* court recognized that the issue before the court of appeals was a purely legal issue, as well. It was not the nature of the issue – legal or factual – alone that was determinative.

D.

Public policy considerations support deferential review of qualified immunity.

In addition to the factors identified in *Pierce* which justify an abuse of discretion standard, the public policy considerations underlying qualified immunity also support application of that standard of review. In *Harlow* the social cost of § 1983 litigation was the primary factor in eliminating the subjective component from the clearly established law issue. Once the district court makes a

---

[19] Brief for Petitioner, p. 10.

[20] There are some who would dispute that the qualified immunity issue is a purely legal one after *Anderson v. Creighton, supra*. *See* S. Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983* § 8.08 (3d ed. 1986).

determination of the qualified immunity issue, *de novo* review prolongs the litigation. The present action demonstrates this point. Judged by an abuse of discretion standard, the panel had no difficulty in affirming summary judgment to Holloway. The social costs of the litigation would be over.

A second and related policy consideration – early resolution of the qualified immunity issue – is also promoted by an abuse of discretion standard. Under *Butz* plaintiff must bring forward whatever support he has for his claim when a motion for summary judgment is filed by defendant. Where there is a case which may both be helpful and harmful to a plaintiff's position, plaintiff may choose not to cite it in the district court with the hope that some other law will win the day. If plaintiff loses the qualified immunity issue, and a *de novo* standard of review is applied, plaintiff may then cite the authorities he was afraid to cite in the district court. Worse yet plaintiff may wait until he seeks *en banc* review to argue law which was purposefully and strategically not cited to the district court.

The abuse of discretion standard would make plaintiff come forward with whatever law was on point in the district court. If plaintiff did not, and summary judgment was granted to defendant, plaintiff would be precluded from raising the new law on appeal. The abuse of discretion standard would promote early resolution of the qualified immunity issue and would reduce the social costs of the litigation.

Elder's arguments notwithstanding, an abuse of discretion standard of review does not depart from the

objective standard enunciated in *Harlow*. It simply makes the plaintiff come forward at the earliest possible time to justify his claim. The objective standard is measured at the time plaintiff responds to the government official's pretrial motion. That is consistent with pretrial motion practice in the federal court. It is also consistent with an attorney's obligation under Rule 11 of the Federal Rules of Civil Procedure: "The signature of an attorney . . . constitutes a certificate by the signer that . . . the pleading . . . is warranted by existing law. . . . " The means for counsel to meet the Rule 11 obligation in qualified immunity cases is to locate cases which establish that the law was clearly established.[21]

In the final analysis, there is nothing unjust, and there is nothing unique, about making a litigant justify his position in litigation. "That such a rule may occasionally result in individual injustices has never been doubted, but at least until today, immunity has been accorded nevertheless." *Butz, supra*, at 520-521. In light of the social costs of civil rights litigation against government officials, requiring plaintiff to show clearly established law at the time plaintiff responds to a pretrial motion promotes the policies underlying qualified immunity. An abuse of discretion standard is, therefore, justified.

---

[21] "The primary means open to a plaintiff to demonstrate the clarity of the law violated by a state official, and thus to overcome a qualified immunity defense, is the citation of past cases which have established a given rule or legal principle." Order and Dissents, JA 65 (Reinhardt, J. dissenting).

CONCLUSION

The Court of Appeals' Amended Opinion should be affirmed on the merits of the qualified immunity inquiry that a reasonable officer could have believed Elder's arrest to be lawful, in light of clearly established law and the information Holloway possessed. In the event the Court goes beyond the merits, it should affirm the Court of Appeals' decision to place the burden of proof upon the plaintiff to show clearly established law. Finally, the Court of Appeals' decision on the standard of review should be affirmed because the decision is a narrow one, within the Court's discretion and resulting from invited error. In the alternative, if the decision is interpreted more broadly, it is a logical extension of the burden of proof of clearly established law resting with the plaintiff, is supported by *Pierce*, and is justified by important policy considerations including those underlying qualified immunity.

DATED this 29th day of September, 1993.

Respectfully submitted,

James J. Davis
960 Broadway, Suite 302
P. O. Box 8126
Boise, Idaho 83707

Attorney for Respondents.

Supreme Court, U.S.
FILED
NOV 4 1993
OFFICE OF THE CLERK

No. 92-8579

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

CHARLES K. ELDER,
Petitioner,

v.

R.D. HOLLOWAY, *et al.*,
Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

John C. Lynn
LYNN, SCOTT,
HACKNEY & SULLIVAN
1015 W. Hays Street
Boise, Idaho 83702
(208) 342-7600

Michael E. Tankersley
(Counsel of Record)
Brian Wolfman
Alan B. Morrison
PUBLIC CITIZEN
LITIGATION GROUP
2000 P Street, N.W.,
Suite 700
Washington, D.C. 20036
(202) 833-3000

Counsel for Petitioner

November 4, 1993

BEST AVAILABLE COPY

TABLE OF CONTENTS

Table of Authorities iii

Introduction 1

I. RESPONDENTS' REQUEST THAT THIS COURT RULE THAT THEY ARE ENTITLED TO QUALIFIED IMMUNITY IN LIGHT OF THE APPLICABLE LAW, INCLUDING THE PRECEDENT THAT THE NINTH CIRCUIT REFUSED TO CONSIDER, MUST BE REJECTED. 3

A. The Issue of Whether Respondents Would Prevail On Their Qualified Immunity Claim Is Not Properly Before, And Should Not Be Decided By, This Court. 3

B. If It Is Considered By This Court, Respondents' Claim That, Despite *United States v. Al-Azzawy*, They Are Entitled To Summary Judgment Based On Qualified Immunity Must Be Rejected. 5

1. *United States v. Al-Azzawy* Clearly Established That An Arrest Under The Circumstances Presented Here Requires A Warrant Absent Exigent Circumstances 6

2. The Warrantless Arrest Was Not Justified By Exigent Circumstances 9

II. THE NINTH CIRCUIT ERRED IN HOLDING THAT THE LEGAL ISSUE OF WHETHER THE LAW IS CLEARLY ESTABLISHED MUST BE DECIDED SOLELY BASED ON THE LEGAL AUTHORITIES CITED OR IDENTIFIED BELOW. 11

A. Issues of Law Are To Be Decided Based On All The Relevant Legal Authorities . 11

B. The Decision Below Is Inconsistent With The Purpose of Qualified Immunity 18

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Anderson v. Creighton, 483 U.S. 635 (1987) 8

Beckman v. Dillard, No. 91-15418, slip op., (9th Cir., Aug. 12, 1993) 13

Berkemer v. McCarthy, 468 U.S. 420 (1984) 4

Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993) 4

Buckley v. Fitzsimmons, 113 S. Ct. 2606 (1993) 16

Cardinal Chemical Co. v. Morton Int'l, Inc., 113 S. Ct. 1967 (1993) 14, 16

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) 17

Davis v. Scherer, 468 U.S. 183 (1984) 13, 14, 19

Forrester v. White, 484 U.S. 219 (1988) 16

Griffith v. Kentucky, 479 U.S. 314 (1987) 15

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 16-19

Kamen v. Kemper Financial Services, Inc., 111 S. Ct. 1711 (1991) 12, 16

Lilly v. Grand Trunk Western R. Co., 317 U.S. 481 (1943) 12

Mackey v. United States, 401 U.S. 667 (1971) 15

Malley v. Briggs, 475 U.S. 335 (1986) 20

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 8

Miller v. Fenton, 474 U.S. 104 (1985) 17

Mitchell v. Forsyth, 472 U.S. 511 (1985) 8, 13

Muskrat v. United States, 219 U.S. 346 (1911) 14-15

Payton v. New York, 445 U.S. 573 (1980) 7

Pierce v. Underwood, 487 U.S. 552 (1988) 16-18

Salve Regina College v. Russell, 499 U. S. 225 (1991) 15, 17, 20

Siegert v. Gilley, 111 S. Ct. 1789 (1991) 4, 18

State v. Morse, 480 A.2d (N.H. 1984) 7

Town of South Ottawa v. Perkins, 94 U.S. 260 (1877) 12, 14

United States v. Al-Azzawy, 784 F.2d 890 (9th Cir. 1985) *cert. denied*, 476 U.S. 1144 (1986) . . . . . *passim*

United States v. Botero, 589 F.2d 430 (9th Cir. 1978), *cert. denied*, 441 U.S. 944 (1979) 6

United States v. Edmondson, 791 F.2d 1512 (11th Cir. 1986) 7

United States v. Maez, 872 F.2d 1444 (10th Cir. 1989) 7

United States v. Morgan, 743 F.2d 1158 (6th Cir. 1984), *cert. denied*, 471 U.S. 1061 (1985) 7

Yee v. City of Escondido, 112 S.Ct. 1522 (1992) 4, 5, 15

Young v. United States, 315 U.S. 257 (1942) 14

STATUTES AND COURT RULES

28 U.S.C. § 2412(d) 17

42 U.S.C. § 1983 16

Sup. Ct. R. 14.1(a) 4

No. 92-8579

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

CHARLES K. ELDER,

Petitioner,

v.

R.D. HOLLOWAY, *et al.*

Respondents.

REPLY BRIEF FOR PETITIONER

Introduction

In the decision below, the Ninth Circuit refused to consider one of its own precedents that, it acknowledged, "is closely on point and could make a difference in the outcome of this case." JA 26-27. Instead, it created a new rule, applicable only to qualified immunity decisions, that requires it to disregard any legal authorities not cited to, or discovered by, the district court.

Evidently hesitant to defend the Ninth Circuit's decision on its own terms, Respondents begin their Brief by urging this Court *not* to review the Ninth Circuit's holding, but to decide the issue that the Ninth Circuit itself deliberately declined to decide. As we discuss below in Part I, Respondents' effort to redefine the question presented should be rejected. The

question presented in this case, namely the propriety of the Ninth Circuit's novel rule of refusing to consider authorities not cited below, is logically antecedent to the question of whether those authorities clearly establish a violation of federal rights, and the proper application of Ninth Circuit precedent should not be resolved in the first instance by this Court. Moreover, if this Court were to go beyond the question presented, the precedent that the Ninth Circuit refused to consider and disputed factual issues identified by the district court preclude granting Respondents' motion for summary judgment on their qualified immunity claim.

In Part II, we show that Respondents' arguments in defense of the Ninth Circuit's rule that uncited law must be disregarded on appeal in qualified immunity cases merely repeat the two flaws in the Ninth Circuit's analysis. First, Respondents claim that appellate courts may not consider uncited authorities because plaintiff has the "burden of showing" a violation of clearly established law. But this argument overlooks the difference between factual and legal issues and, in particular, ignores the appellate court's duty to declare the correct legal rule, even if the relevant authorities were not located by the parties or the district court. Second, Respondents argue that the public policy behind qualified immunity favors the Ninth Circuit's rule. The decision below, however, upsets the balance struck by this Court's qualified immunity decisions by mandating the dismissal of meritorious claims and immunizing officials who violate clearly established federal rights solely because a claimants' lawyer stumbles in locating authority in the trial court. Because it frustrates the purposes of appellate review and upsets the balance this Court has struck in the qualified immunity doctrine, the "Elder rule" must be set aside.

I. RESPONDENTS' REQUEST THAT THIS COURT RULE THAT THEY ARE ENTITLED TO QUALIFIED IMMUNITY IN LIGHT OF THE APPLICABLE LAW, INCLUDING THE PRECEDENT THAT THE NINTH CIRCUIT REFUSED TO CONSIDER, MUST BE REJECTED.

The principal argument of Respondents and their *amici* is that this Court should not review the propriety of the Elder rule, but should instead decide that Respondents prevail on their qualified immunity claim even if the authority that the Ninth Circuit disregarded, *United States v. Al-Azzawy*, 784 F.2d 890 (9th Cir. 1985), *cert. denied*, 476 U.S. 1144 (1986), is considered. *See* Brief of Respondents at 6-20 ("Resp. Br."); Brief Amici Curiae of the States of Hawaii, *et al.* at 4-14 ("Amici Br."). This argument should be rejected because (A) the issue is not properly before the Court; and (B) if this Court were to decide the issue, the Ninth Circuit precedent and disputed factual issues concerning the circumstances of the arrest require that Respondents' motion for summary judgment on qualified immunity be rejected.

A. The Issue of Whether Respondents Would Prevail On Their Qualified Immunity Claim Is Not Properly Before, And Should Not Be Decided By, This Court.

Respondents urge that this Court assume, without deciding, that the limitation on appellate review established in the Elder rule is erroneous, and decide the issue that the court below left open when it declined to consider whether its prior decision "clearly established" the law at issue. This proposal to avoid reviewing the Elder rule should be rejected for three reasons.

First, the issue the Respondents urge this Court to reach is not the question on which review has been granted. The Petition makes quite clear that it does not seek review of whether the Ninth Circuit should have held that the law was clearly established, but whether the Ninth Circuit erroneously limited its review to the authorities presented to the district

court.[1] The fact that Respondents' argument goes beyond the question presented is, alone, enough to exclude it from consideration. *See Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753, 764-65 (1993); *Berkemer v. McCarthy*, 468 U.S. 420, 443 n. 38 (1984).

Second, the issue that Respondents urge this Court to reach is not "a subsidiary question fairly included" within the question presented. Sup. Ct. Rule 14(a); *Yee v. City of Escondido*, 112 S.Ct. 1522, 1533-34 (1992). To the contrary, the relationship between the two questions is the reverse. The question of which legal authorities should be considered in determining whether the law is clearly established must be resolved before a court can address whether those legal authorities "clearly establish" a violation of protected rights.

Indeed, "the proper analytical framework for determining whether a plaintiff's allegations are sufficient to overcome a defendant's defense of qualified immunity," *Siegert v. Gilley*, 111 S. Ct. 1789, 1793 (1991), requires the courts to decide first which legal authorities to consider in making that determination. For this reason, Respondents' reliance on *Siegert v. Gilley*, *supra*, is misplaced. In *Siegert*, this Court indicated that qualified immunity issues should be resolved in an "analytical structure" that resolves preliminary issues first. *Id.* at 1793. In this case the question of whether the Elder rule improperly limits the legal authorities considered is a preliminary issue in the resolution of the qualified immunity issue that Respondents urge this Court to decide. Thus, *Siegert* not only does not support Respondents' position that the Court should avoid reviewing the Elder rule, but underscores that this

---

[1] *See* Petition for a Writ of Certiorari at i ("The Elder rule sets forth the proposition that in considering a civil rights plaintiff's challenge to a state official's qualified immunity defense, appellate courts may not consider cases or precedents which the plaintiff failed to cite to the district court. Therefore, the question presented here is whether a party on appeal may rely *only* on those authorities cited to the district court") (emphasis in original).

Court should not "assume[] without deciding this preliminary issue." *Id.* at 1793.[2]

Third, the issue that Respondents urge this Court to reach should be decided by the lower courts, and not by this Court in the first instance. This Court generally avoids deciding issues that were not addressed by the lower courts. *Yee v. City of Escondido*, 112 S.Ct. at 1534. That practice is particularly appropriate here for two reasons. First, the issue of whether the Ninth Circuit's decision in *Al-Azzawy* was sufficient to "clearly establish" that an arrest effected by surrounding a house requires a warrant absent exigent circumstances is a legal question that should be addressed by the Ninth Circuit. Moreover, the district court concluded that disputed issues of fact precluded it from deciding on summary judgment whether the failure to obtain a warrant was excused by "exigent circumstances." JA 16. The district court's ruling on this point strongly counsels against this Court trying to resolve the immunity issue on the current record.

B. If It Is Considered By This Court, Respondents' Claim That, Despite *United States v. Al-Azzawy*, They Are Entitled To Summary Judgment Based On Qualified Immunity Must Be Rejected.

Respondents' qualified immunity claim raises two distinct issues: (1) whether it was "clearly established" in April, 1987,

---

[2] Respondents also err in stating that in *Seigert* this Court held that the initial inquiry in a civil rights case should be the qualified immunity issue of "whether the plaintiff asserts the violation of a clearly established right." Resp. Br. at 6. To the contrary, the Court concluded that the first inquiry is "the determination of whether the plaintiff has asserted a violation of a constitutional right at all," 111 S. Ct. at 1793, and because the allegations in *Siegert* failed to state such a claim, it was not necessary to address the appellate court's holding concerning a heightened pleading standard for qualified immunity.

that an arrest that is effected by surrounding a house and requesting that the individual inside surrender requires a warrant, absent exigent circumstances; and (2) whether, if this legal rule was clearly established, it was reasonable for Respondents to conclude that exigent circumstances existed. If this Court chooses to go beyond the question presented to decide these issues in the first instance, Respondents' claim must be rejected because *Al-Azzawy* clearly established that a warrant was required absent exigent circumstances, and Respondents' claims of "exigency" rest on disputed facts that cannot be resolved on summary judgment.

1. *United States v. Al-Azzawy* Clearly Established That An Arrest Under The Circumstances Presented Here Requires A Warrant Absent Exigent Circumstances.

Over a year prior to the arrest in this case the Ninth Circuit declared that where officers surround a residence and, with a "show of force and authority," order the occupant to leave the residence, the Fourth Amendment requires that, absent exigent circumstances, the officers must obtain a warrant for the arrest. *United States v. Al-Azzawy*, 784 F. 2d at 893. Respondents' contention that this decision did not clearly establish the legal rules with respect to this issue does not withstand scrutiny.

Respondents' arguments that precedents other than *Al-Azzawy* did not clearly resolve the issue, Resp. Br. at 13-17, are beside the point. *Al-Azzawy* directly addressed the issue, and there was (and still is) no contrary authority in the Ninth Circuit that would cast doubt on *Al-Azzawy*'s conclusion on this question. The only Ninth Circuit decision that Respondents rely on here, *United States v. Botero*, 589 F.2d 430 (9th Cir. 1978), *cert. denied*, 441 U.S. 944 (1979), held that no warrant was required where the defendant was arrested after voluntarily opening the door in response to the arresting officer's knock. Resp. Br. at 15-16. That decision does not diminish the clarity of the Ninth Circuit's subsequent holding that where, as here, an individual does "not voluntarily expose himself to [the arresting officers'] view or control outside" the residence, but

is ordered to exit "under circumstances of extreme coercion," a warrant is required. *Al-Azzawy*, 784 F.2d at 893.

Amici dismiss *Al-Azzawy* by arguing that lower court decisions should be disregarded, and officials should be denied qualified immunity only if this Court's opinions foreclose all substantial doubts that a right is "clearly established." Amici Br. at 9-10, 11-13. None of this Court's precedents support this novel proposal, and it would require routine dismissal of civil rights claims on qualified immunity grounds, except for those few cases that involve conduct indistinguishable from conduct that this Court has previously held violates federally protected rights. Moreover, the issue of whether a conflict among the circuits is sufficient to demonstrate that the law is not clearly established is not presented here because each circuit that has addressed the issue decided in *Al-Azzawy*, both before and after *Al-Azzawy*, has reached the same conclusion as the Ninth Circuit.[3]

Respondents also err in suggesting that *Al-Azzawy*'s conclusions concerning the warrant requirement must be disregarded as "dicta" because *Al Azzawy* ultimately held that the arrest was justified by exigent circumstances. Resp. Br. at 18; Amici Br. at 14. A legal conclusion in a decision may

---

[3] *See United States v. Maez*, 872 F.2d 1444 (10th Cir. 1989); *United States v. Edmondson*, 791 F.2d 1512 (11th Cir. 1986); *United States v. Morgan*, 743 F.2d 1158 (6th Cir. 1984), *cert. denied*, 471 U.S. 1061 (1985).

Respondents' statement that *State v. Morse*, 480 A.2d 183 (N.H. 1984), "acknowledged that there was a split of authority as to whether a warrant was required under the circumstances," is erroneous. Resp. Br. at 15. *Morse* observes that "[j]urisdictions are split on whether *Payton [v. New York*, 445 U.S. 573 (1980)] invalidates warrantless arrests occurring immediately after the defendant opened a door in response to a police knock," 480 A.2d at 186. The decision does not state that there is any disagreement that, absent exigent circumstances, a warrant is required when an arrest is effected under the circumstances presented in *Al-Azzawy* and in this case.

"clearly establish" the law even if it is not the ultimate holding of the case. For example, this Court's conclusion in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that the courts have the power to review claims that executive officials have failed to perform mandatory duties represented an authoritative declaration of the law on that issue, even though the court ultimately held that it lacked jurisdiction to issue the writ. This Court's qualified immunity decisions also make plain that law is not "established" solely by the precise holdings of cases, because, under such a test, an official would always be immune "merely because the warrant requirement has never explicitly been held to apply to a search conducted in identical circumstances." *Mitchell v. Forsyth*, 472 U.S. 511, 535 n. 12 (1985). Qualified immunity must be denied if "in light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Under this standard, the Ninth Circuit's conclusions in *Al-Azzawy* concerning the need for a warrant where the police surround an arrestee at a residence cannot be disregarded in the qualified immunity analysis.

Respondents next contend that the Ninth Circuit's reference to *Al-Azzawy*, as "arguably applicable and dicta," Resp. Br. at 18, supports their claim that the district court's qualified immunity ruling would not be affected if *Al-Azzawy* was considered. Resp. Br. at 18. This argument, however, merely begs the question. Because the Ninth Circuit deliberately decided *not* to resolve this issue, and even declared that its decision could not serve as precedent in other cases where *Al-Azzawy* was cited, JA 43, the court's discussion cannot be construed as having decided the issue in favor of Respondents. Indeed, the appellate court acknowledged "that *Al-Azzawy*'s initial conclusion might have alerted a reasonable officer to the constitutional implications of putting a suspect under arrest

after he had come outside his house pursuant to an order to exit." JA 35.[4]

Finally, respondents argue that, because *Al-Azzawy* noted that it was "'a close question'" whether the warrantless arrest was lawful, Respondents must be entitled to qualified immunity. Resp. Br. at 18-19 (quoting *Al-Azzawy*, 784 F.2d at 894). The "close question" language, however, does not refer to the issue of whether the warrant requirement is triggered when officers surround a house and order a suspect to exit under a show of force, but to the distinct issue of whether the failure to obtain a warrant in *Al-Azzawy* was excused by "exigent circumstances." *Al-Azzawy*, 784 F.2d at 894. As we show below, Respondents cannot take refuge in this language because the facts relating to the "exigent circumstances" issue in *Al-Azzawy* were substantially different from those presented here and, moreover, in this case the facts concerning "exigent circumstances" are in dispute.

2. The Warrantless Arrest Was Not Justified By Exigent Circumstances.

Respondents also argue that they are entitled to qualified immunity because they reasonably concluded that there was no time to secure a warrant under the circumstances. Resp. Br. 20. The district court, however, held that factual disputes precluded resolving whether the warrantless arrest was justified by "exigent circumstances," JA 16, and the court of appeals declined to address the issue. JA 32. This Court should not second-guess the district court reading of the factual record and, in any event, the district court's conclusion was plainly correct.

The evidence shows that Respondents had ample opportunity to obtain a warrant before arresting Petitioner. Respondents received reports that there were outstanding warrants for Petitioner and that Petitioner was armed and hostile on April

---

[4] We also note that, contrary to their current argument that *Al-Azzawy* supports their claim of qualified immunity, Respondents declined to rely on *Al-Azzawy* below. JA 35.

21, 1987, six days before the arrest. Four days before the arrest, Respondents confirmed that Florida authorities had issued arrest warrants for Petitioner. Two days before the arrest, an Ada County officer conducted surveillance at the house and identified Petitioner there. Nonetheless, no effort was made to obtain an arrest warrant before Respondents went to the home to arrest Petitioner on April 27, 1987. *See* Dep. of R. Holloway 35-36, 62-65, Exhibits 1, 2.[5]

The evidence also belies any claim that Respondents did not plan to arrest Petitioner when they went to the home without a warrant. Respondents went to arrest Petitioner *after* they had already been informed that Petitioner had left the work-site where he was employed, and proceeded immediately from the work-site to the home. Indeed, officers were waiting for Petitioner at the house even before he returned from the work-site. Respondents surrounded the house, summoned additional officers to the scene, blocked the roads, and cleared all houses in the immediate area. Dep. of R. Holloway at 68-83. Their claim that they intended "to surveil the residence and arrest Elder once he exited," Resp. Br. at 1, is, at best, a matter in dispute that is contradicted by the testimony and conduct which confirm that Respondents planned to arrest Petitioner at the home whether he exited voluntarily, or was forced to exit after being surrounded. *See* Dep. of R. Holloway at 35, 81, Exhibit 2 at 8.

Finally, Respondents created the circumstances that they claim justify the failure to obtain a warrant before arresting Petitioner. Contrary to Respondents' claim that they sought to arrest Petitioner in the home only because Petitioner's brother

[5] The advance notice and planning by Respondents show that the circumstances of the arrest here are not comparable to those held sufficient to establish "exigent circumstances" in *Al-Azzawy* where there were no advance reports or surveillance, and the arrest was made shortly after the officers were first summoned to the home to investigate a disturbance. *Al-Azzawy*, 784 F.2d at 891, 894.

"discovered" the officers conducting surveillance, Resp. Br. at 20, the evidence shows that the officers were not "discovered," but stopped Petitioner's brother, William Elder, when he left the home on horseback.[6] The officers immediately enlisted William Elder to tell Petitioner that he should surrender because the house was surrounded by armed officers. *Id.* On this record, the district court properly rejected Respondents' claim that they were entitled to summary judgment on their assertion that there was no time to obtain a warrant before the arrest.

II. THE NINTH CIRCUIT ERRED IN HOLDING THAT THE LEGAL ISSUE OF WHETHER THE LAW IS CLEARLY ESTABLISHED MUST BE DECIDED SOLELY BASED ON THE LEGAL AUTHORITIES CITED OR IDENTIFIED BELOW.

In our opening brief we showed that the restriction on appellate review created by the Ninth Circuit is flawed in two respects: it is inconsistent with the role of appellate courts in deciding legal issues, and inconsistent with the rationale behind qualified immunity. In defending the holding below, Respondents repeat these same errors. Like the Ninth Circuit, their argument is based on treating legal issues like factual issues, and ignoring the competing public interests that the qualified immunity standard seeks to balance.

A. Issues of Law Are To Be Decided Based On All The Relevant Legal Authorities.

Respondents contend that the Elder rule is justified as (1) a burden of proof rule, (2) an exercise of appellate discretion, or

[6] The official report on the incident states, "William Elder was allowed to ride his horse east on Hanks Street, then south on Carpenter Street to near the intersection of Columbia Road, where he was stopped by Det. DeVeny and a uniformed patrol officer who had been called to the area for assistance." Dep. of R. Holloway, Exhibit 2 at 7. *See also* Dep. of William Elder at 57-58 (Petitioner's brother did not realize police were in the area until stopped by officer who drove up behind him).

(3) a deferential standard of appellate review. Each of these arguments is fundamentally flawed because the appellate court's role in deciding issues of law is not simply to select among the views of the parties and the district court, but "to identify and apply the proper construction of governing law." *Kamen v. Kemper Financial Services, Inc.*, 111 S. Ct. 1711, 1718 (1991).

1. Respondent's principal argument is that the Elder rule properly places the "burden of showing" that legal rules are clearly established on the plaintiff, in the same way that plaintiffs normally have the burden of alleging a *prima facie* case or proving facts. Resp. Br. at 21-26, 31-32. The fundamental defect in this argument is that it treats legal precedents as if they were facts to be proven and, indeed, echos the Ninth Circuit's argument that precedents should be treated as "legal facts." JA 39-40. Unlike factual issues, however, legal issues are not dependent on evidence under the control of the parties or unique to a particular case. For these reasons, this Court has never suggested that a precedent should be disregarded if it is first cited on appeal. While factual issues are to be decided based on the record created by the parties, legal issues are to be decided by applying the governing legal norms, which do not depend on the parties or the particular case.

This Court's decisions underscore this difference between legal and factual issues. In *Lilly v. Grand Trunk Western R. Co.*, 317 U.S. 481 (1943), the Court upheld a jury verdict against the railway based on a rule promulgated by the Interstate Commerce Commission. The Court rejected the argument that the Rule could not be considered on appeal "because it was not called to the attention of the trial court or the jury." *Id.* at 488. Rules that have the force of law are not a matter of proof, this Court held, but are to be judicially noticed, and a party is entitled to the benefits of a valid legal rule even if counsel failed to call it to the attention of the trial court. *Id.* at 488-89.

Similarly, in *Town of South Ottawa v. Perkins*, 94 U.S. 260 (1877), this Court held that the question whether bonds were

invalid, because the law authorizing their issue had never been properly enacted, was not a factual matter that a party could be estopped from raising or even had the burden of alleging. "[I]t was not necessary to have raised an issue on the subject, except by demurrer to the declaration." *Id.* at 268. "The question as to the existence of a law is a judicial one," and the courts are obligated to resolve the question in accordance with the applicable legal authorities. *Id.*

Respondents' argument that these principles do not apply to review of the legal issue in qualified immunity claims because this Court, and other courts, have stated that the plaintiff has the "burden of showing" a deprivation of clearly established rights, *see* Resp. Br. at 21-25, reads far too much into the language of those decisions. Plaintiffs have a "burden of showing" a violation in that they must make factual allegations and, at the summary judgment stage, must show factual proof of a violation of clearly established law. But nothing in *Davis v. Scherer*, 468 U.S. 183 (1984), or this Court's other decisions indicates that the "burden of showing" language was also intended to convert the "purely legal issue" of "whether the facts alleged . . . support a claim of violation of clearly established law," *Mitchell v. Forsyth*, 472 U.S. at 528 n.9, into an issue of proof. As Judge Kozinski observed in his dissent, "[i]n none of [this] Court's qualified immunity analyses is there support for the panel's rule that a section 1983 (or *Bivens*) plaintiff loses on appeal if, though his factual allegations show a violation of clearly established law, he did not cite the right case to the district court to prove that the law was clearly established." JA 56-57. The test for qualified immunity is whether the facts show a violation of clearly established law, not whether the facts show a violation of the precedents cited.[7]

---

[7] Moreover, even if precedents were treated like facts, this would not justify the Elder rule, which allows an appellate court to consider cases as long as the district court "come[s] up" with the law on its own. JA 43. Surely, a district court could not consider facts that the plaintiff had failed to introduce into the

2. Respondents also argue that the decision below should be upheld as an exercise of discretion to refuse to correct a legal error. Resp. Br. at 28-31. The decision below, however, cannot be fairly portrayed as an exercise of discretion limited to the facts of this case. The Ninth Circuit did not base its decision on its own discretionary authority, but on its construction of this Court's decision in *Davis v. Scherer*, 468 U.S. 183 (1984). JA 38-39; *cf. Cardinal Chemical Co. v. Morton Int'l, Inc.*, 113 S. Ct. 1967, 1978 (1993) (Scalia, J., concurring) (appellate practice based on erroneous reading of Supreme Court precedents is abuse of discretion). Moreover, the Ninth Circuit did not limit its decision to this case, but cast its holding as a nondiscretionary restriction on appellate review that applies generally, and has been applied, to qualified immunity cases. *See* JA 43, 44-45; *Beckman v. Dillard*, No. 92-15418, slip op. (9th Cir. Aug. 12, 1993). Indeed, the Court acknowledged that it was crafting an exception to the ordinary rule that "the district court must divine and apply the law correctly, no matter what cases are cited by the parties," and "[t]he court of appeals has a correlative obligation to correct error when it occurs." JA 41.

More fundamentally, Respondents' argument that "[t]he panel certainly had discretion not to correct Elder's error whether the error was law or fact," Resp. Br. at 30, once again ignores the differences between determinations of law and fact. The principles of estoppel that apply to facts do not apply to issues of law. *Town of South Ottawa v. Perkins*, 94 U.S. at 267. Even if the parties were to formally stipulate that a court should disregard certain precedents in deciding a legal issue, a court would not have discretion to declare and apply an erroneous legal rule based on an artificial universe of legal authorities chosen by the parties. *Young v. United States*, 315 U.S. 257, 259 (1942) (determination of legal issues "cannot be left merely to the stipulation of the parties"); *cf. Muskrat v.*

---

record.

United States, 219 U.S. 346, 362 (1911) (courts lack authority to render advisory opinions).

Respondents' argument that, because courts have the discretion not to consider a legal *issue*, they also have the discretion to disregard a legal *precedent*, is also flawed. Resp. Br. at 33-34; *Amici* Br. at 16. The discretion to leave a legal issue undecided does no violence to the court's law-declaring function because, in withholding judgment, the court does not declare or apply an incorrect legal rule. In contrast, if, as Respondents argue, a court has the discretion to disregard relevant authority, the law-declaring function is corrupted because the ruling purposefully rests on an incomplete review of the applicable law. Such a decision violates a basic norm of adjudication because the decision is not applicable to similarly situated parties, but is a rule created for, and applied to, only the parties in that particular case. *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987); *Town of South Ottawa v. Perkins*, 94 U.S. at 267. When a court makes and applies rules in such an *ad hoc* manner its "'function is not one of adjudication but in effect of legislation.'" *Griffith*, 479 U.S. at 323 (1987) (quoting *Mackey v. United States*, 401 U.S. 667, 679 (1971) (Harlan, J., concurring in the judgment)).

Moreover, this Court has made clear that, although parties generally cannot raise new legal issues on appeal, if a claim or issue was presented below, "a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 112 S.Ct. at 1532. It is anomalous to suggest that, although parties can raise any new legal arguments based on issues raised below, they cannot rely on precedents that support those arguments unless the cases were cited below. Indeed, Respondents' proposition that appellate courts have general discretion to disregard applicable precedents when they review legal issues is inconsistent with the appellate courts' function of providing independent review that brings "to bear on the legal issues more information and more comprehensive analysis than was provided for the district judge." *Salve Regina College v. Russell*, 499 U.S. 225, 232 (1991).

Finally, even if one assumes that courts may be justified in exercising discretion to disregard precedent that was not cited below in some unusual cases, such a practice cannot be justified in qualified immunity cases in light of the countervailing interests in vindicating deprivations of constitutional rights. *Cf. Cardinal Chemical Co. v. Morton Int'l, Inc.*, 113 S. Ct. at 1976-78 (practice of vacating judgments cannot be supported because of countervailing public interests). Civil rights actions serve important public policies by deterring abuse of official authority, and by providing "the only realistic avenue for vindication of constitutional guarantees," in many cases. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). No "overriding consideration of public policy" is served by permitting appellate courts to dismiss meritorious civil rights claims because the precedent demonstrating that the law was clearly established was not identified in the district court. *Forrester v. White*, 484 U.S. 219, 224 (1988). Indeed, this Court has repeatedly emphasized that the courts do not have the authority to expand the scope of absolute immunity from actions under 42 U.S.C. § 1983 to serve other policy interests. *Buckley v. Fitzsimmons*, 113 S. Ct. 2606, 2613 (1993). The same considerations require rejecting Respondents' argument that qualified immunity should be expanded by limiting review of legal issues in the name of appellate discretion.[8]

3. Finally, Respondents argue that the Ninth Circuit's decision is justified as a deferential review of district court decisions on legal issues analogous to the abuse of discretion

---

[8] Thus, the suggestion in footnote 5 of *Kamen v. Kemper Financial Serv., Inc.*, 111 S. Ct. 1711 (1991), that failure to comply with a "reasonable local rule" may provide a basis for a court to sanction a litigant by deciding a claim according to a truncated body of law does not apply here since the Ninth Circuit has no such local rule, the decision below was based on its construction of this Court's decision in *Davis* rather than its own discretion, and countervailing considerations weigh against such a practice in the qualified immunity context.

standard approved in *Pierce v. Underwood*, 487 U.S. 552 (1988). Resp. Br. at 34-38. The central problem with this argument is that the Elder rule is not a standard of deferential review, but a rule of preclusion or estoppel. The Elder rule does not involve deferring to a district court's assessment of relevant factors under a general standard, but requires an appellate court to affirm even where it is clear that the district court did not consider controlling authority and has made a very specific, but erroneous, ruling of law. Thus, *Pierce* provides no support for the Elder rule. *Pierce* held only that the abuse of discretion standard governs review of a ruling on whether the government's position was "substantially justified" under the Equal Access to Justice Act. 28 U.S.C. § 2412(d). An abuse of discretion standard, however, does not permit an appellate court to disregard its own or other precedent since "[a] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

Moreover, the reasoning underlying *Pierce* does not support any departure from the standard of independent appellate review on the legal issue of whether the law was clearly established. *Pierce* and other cases have recognized that exceptions to the norm of *de novo* review may be appropriate where the lower court "'is better positioned . . . to decide the issue in question,'" 487 U.S. at 559-60 (quoting *Miller v. Fenton*, 474 U.S. 104, 114 (1985)), and where the issues are "'not amenable to regulation by rule because they involve multifarious, fleeting, special, narrow facts that utterly resist generalization.'" *Pierce*, 487 U.S. at 561-62 (quoting Rosenberg, Judicial Discretion of the Trial Court, Viewed from Above, 22 Syracuse L. Rev. 635, 662-63 (1971)); *see also*, *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. at 403-04 (discussing same two factors); *Salve Regina*, 499 U.S. at 233 (discussing cases). The issue of whether the law is clearly established not only does not have either of these characteristics, but is the antithesis of such issues. The district courts are plainly not "better positioned" to decide the issue because qualified immunity requires an "objective" assessment

of legal authorities which are equally accessible to the appellate court. *Cf. Salve Regina*, 499 U.S. at 239 (state law is "equally communicable" to district and appellate judges). And, far from being resistant to the formulation of definite rules, the qualified immunity standard, by definition, requires determination of whether existing law has "clearly established" the standard of conduct. *Harlow v. Fitzgerald*, 457 U.S. at 818-19. Thus, nothing in the qualified immunity inquiry "warrants departure from a rule of independent appellate review." *Salve Regina*, 499 U.S. at 234.[9]

B. The Decision Below Is Inconsistent With The Purpose of Qualified Immunity.

Respondents also contend that "public policy considerations underlying qualified immunity" support the Elder rule. Resp. Br. at 27, 38. This argument, however, is based on a distorted characterization of the rationale behind this Court's rulings on qualified immunity. The purpose of qualified immunity is not, as Respondents suggest, a one-dimensional interest in reducing the cost of litigation to defendants by encouraging the early dismissal of civil rights actions. To the contrary, the qualified immunity standard strikes a "balance" between competing interests "in vindication of citizens' constitutional rights and in

---

[9] The two other factors discussed in *Pierce* are simply not applicable to qualified immunity determinations. There is nothing in the law of qualified immunity comparable to the statutory direction in the Equal Access to Justice Act that this Court found significant in *Pierce* because it "suggests some deference to the district court." 487 U.S. at 559. In addition, the danger that a decision will "effectively establish the circuit law in a most peculiar, second handed fashion," that was present in *Pierce*, *id.* at 561, is not present in appellate review of qualified immunity claims since appellate courts should first determine whether the claim states a cause of action before addressing the qualified immunity issue, *see Siegert v. Gilley*, 111 S. Ct. at 1793, and the qualified immunity issue, by definition, requires that the court determine whether the legal rules are *already* "clearly established." *See* Petitioner's Brief at 13 n.2.

public officials' effective performance of their duties." *Davis v. Scherer*, 468 U.S. at 195.

The Elder rule serves neither of these interests. While the qualified immunity standard is designed to encourage the dismissal of "insubstantial claims" prior to trial, *Harlow v. Fitzgerald*, 457 U.S. at 818, the Elder rule results in the dismissal of claims regardless of their merit. Thus, the Elder rule undermines "[t]he public interest in deterrence of unlawful conduct," 457 U.S. at 819, because it provides that claims against officials who have unreasonably violated federal rights shall be dismissed if, fortuitously, legal authorities are not identified during the district court proceedings. It also does not serve the public interest "in compensation of victims," *id.*, since it provides that victim's claim shall be dismissed as matter of law, even if the appellate court is aware of authority demonstrating that the claim is meritorious. *See* Petitioner's Brief at 23-28.

The one-sided nature of Respondents' definition of the public policy interest is reflected in the fact that their argument only discusses denying *de novo* review to plaintiffs, and not to defendants. Resp. Br. at 38-39. If applied equally, the Elder rule would also mean that defendants appealing a district court's denial of their qualified immunity claim would be barred from relying on authorities not identified below. Such a restriction would encourage, as Respondents say, "early resolution of the qualified immunity issue," Resp. Br. at 39, but it would also require officials to defend, and potentially be held liable for, claims that should be dismissed under governing law. *See* JA 60, 64. Respondents would undoubtably protest that such a restriction on appellate review of defendants' claims is inconsistent with the underlying rationale of qualified immunity, and that a party should not be so harshly penalized for counsel's failure to identify a legal authority in the district court. Restricting appellate review of plaintiffs' claims is improper for precisely the same reasons.

Finally, Respondents' argument that the Elder rule is justified as a means of preventing claimants from playing "dog in the manger" by deliberately withholding favorable

authorities in the district court, Resp. Br. at 32, 39, simply does not make sense. It is difficult, if not impossible, to conceive of any reason why a claimant would purposefully risk losing in the district court by withholding a helpful precedent until the appeal.

On the other hand, because of the "logistical burdens of trial court advocacy," *Salve Regina*, 499 U.S. at 231, the research and analysis that counsel and the court are able to bring to bear on the legal issues in the trial court will often be less thorough than that available on appeal, where "questions of law become the focus." *Id.* at 232. In the past this Court has recognized that "ours is not an ideal system," and the errors that occur within the system should not provide a basis for dismissing claims against officials that violate clearly established federal law. *Malley v. Briggs*, 475 U.S. 335, 345-46 (1986). The Elder rule should be rejected because, rather than serving the purposes behind this Court's qualified immunity doctrine, it compounds the effect of oversights in the trial court by mandating that the appellate court close its eyes to precedent and affirm results based on errors of law.

CONCLUSION

For reasons stated above, and in our opening brief, the Ninth Circuit's decision should be reversed.

Respectfully submitted,

John C. Lynn
LYNN, SCOTT,
HACKNEY & SULLIVAN
1015 W. Hays Street
Boise, Idaho 83702
(208) 342-7600

Michael E. Tankersley
(Counsel of Record)
Brian Wolfman
Alan B. Morrison
PUBLIC CITIZEN
LITIGATION GROUP
2000 P Street, N.W.,
Suite 700
Washington, D.C. 20036
(202) 833-3000

November 4, 1993

Counsel for Petitioner

Supreme Court, U.S.
FILED
AUG 13 1993
OFFICE OF THE CLERK

No. 92-8579

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CHARLES K. ELDER,
Petitioner,

v.

R. D. HOLLOWAY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF FOR THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

R. WILLIAM IDE III *
President,
American Bar Association
ALAN I. HOROWITZ
ANTHONY F. SHELLEY
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000
* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

18 pp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-8579

CHARLES K. ELDER,
Petitioner,

v.

R. D. HOLLOWAY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The American Bar Association ("ABA") hereby respectfully moves for leave to file the attached brief as amicus curiae in this case. Counsel for petitioner has consented to the filing of this brief, but counsel for respondents has declined to consent.

The ABA is a voluntary membership organization of the legal profession dedicated to the promotion of a fair and effective system for the administration of justice. *See* ABA Const., art. 1, § 1.2. The question presented in this case is whether an appellate court reviewing the

dismissal of a civil rights claim on qualified immunity grounds is limited to considering the case authority that the plaintiff cited to the district court. This question raises issues relating to the fair administration of justice and to the role played by the legal profession in our judicial system. These issues implicate core concerns of the ABA, and its perspective on them should assist this Court's deliberations because of the ABA membership's considerable experience with the judicial process.

Respectfully submitted,

R. WILLIAM IDE III *
President,
American Bar Association
ALAN I. HOROWITZ
ANTHONY F. SHELLEY
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000

AUGUST 1993

* *Counsel of Record*

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
APPELLATE COURTS SHOULD DECIDE APPEALS FROM DISMISSALS OF SECTION 1983 ACTIONS ON QUALIFIED IMMUNITY GROUNDS WITH REFERENCE TO ALL APPLICABLE LEGAL PRECEDENTS, NOT JUST THOSE CITED BY THE PLAINTIFF TO THE DISTRICT COURT	4
A. The Ninth Circuit's Rule Contravenes Fundamental Tenets of Our Judicial System	4
1. It is the Responsibility of the Court to Determine the Applicable Law	4
2. The Decision Below Confuses the Distinction Between Fact and Law	6
B. The Ninth Circuit's Rule Undermines the Fair Administration of Section 1983 Cases	10
CONCLUSION	13

TABLE OF AUTHORITIES

CASES	Page
Butler v. McKellar, 494 U.S. 407 (1990)	8
Griffith v. Kentucky, 479 U.S. 314 (1987)	10
Harlow v. Fitzgerald, 457 U.S. 800 (1982)	7
Harper v. Virginia Dep't of Taxation, 61 U.S.L.W. 4664 (June 18, 1993)	10
Hormel v. Helvering, 312 U.S. 552 (1941)	6
Hutto v. Davis, 454 U.S. 370 (1982)	4
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)	4
Mitchell v. Forsyth, 472 U.S. 511 (1985)	7
Penry v. Lynaugh, 492 U.S. 302 (1989)	8
Pierce v. Underwood, 487 U.S. 552 (1988)	10
Procunier v. Navarette, 434 U.S. 555 (1978)	7
Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 113 S.Ct. 1920 (1993)	9
Romero v. Kitsap County, 931 F.2d 624 (9th Cir. 1991)	7
Spencer v. NLRB, 712 F.2d 539 (D.C. Cir. 1983), *cert. denied*, 466 U.S. 936 (1984)	10
Teague v. Lane, 489 U.S. 288 (1989)	8
United States v. Leon, 468 U.S. 897 (1984)	9
MISCELLANEOUS	
ABA Committee on Professional Ethics and Grievances, Formal Op. 280 (1949)	5
ABA Constitution, Article 1, § 1.2	1
Code of Judicial Conduct Canon 3A(4)	5
The Federalist No. 78 (Hamilton) (J. Cooke, ed. 1961)	4
Model Code of Professional Responsibility (1980)	
DR 7-101(A)(3)	7
DR 7-106(B)(1)	5
DR 7-106(B)(1) note 80	5
Model Rules of Professional Conduct (1992)	
Rule 1.3	7
Rule 3.3(a)(3)	5
Rule 3.3 comment	5
E. Wayne Thode, *Reporter's Notes to Code of Judicial Conduct* (1973)	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-8579

CHARLES K. ELDER,
Petitioner,

v.

R. D. HOLLOWAY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The American Bar Association ("ABA") is a voluntary membership organization of the legal profession dedicated to the promotion of a fair and effective system for the administration of justice. *See* ABA Const., art. 1, § 1.2. The issue presented in this case directly addresses the role that the legal profession plays in the administration of justice. Specifically, this case concerns the consequences that attach to a civil rights plaintiff's failure to

cite relevant case authority to a district court that is considering whether state officials have violated the plaintiff's clearly established constitutional rights.

Because citations of authority are ordinarily the responsibility of counsel, the case ultimately addresses whether counsel's omissions in this situation must cause an individual to forfeit important rights. The interplay between a lawyer's ethical obligations pertaining to citation of authority and vigorous representation of his or her client also bears on the issue presented. These matters are of great interest to the legal profession, and the ABA's perspective on them should be of assistance to the Court.

Moreover, apart from its particular impact on lawyers, the decision below has significant ramifications for the fair administration of justice in section 1983 actions. It therefore implicates core concerns of the ABA, which is well qualified to address the relevant issues because of its membership's considerable experience with the judicial process.[1]

SUMMARY OF ARGUMENT

The Ninth Circuit has adopted an unprecedented rule that will markedly interfere with the fair administration of justice in civil rights damages actions. By requiring an appellate court to rely on legal citations in a party's brief, the court has upset one of the fundamental tenets of our legal system—namely, that it is the province of the court to determine the law. As a practical matter, this rule distorts the judicial process in a way that will increase the occurrence of legally incorrect outcomes and yield an

[1] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Administration Division Council has participated in the adoption of or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Administration Division Council prior to filing.

unwarranted number of disparate results for similarly situated parties. The ultimate consequence will be to undermine both the fairness of the judicial system and the objective standard that this Court has promulgated for resolving qualified immunity claims.

In erroneously shifting responsibility for stating the applicable law from the court to counsel, the Ninth Circuit also places counsel in an unnecessarily difficult position. To a large extent, lawyers unavoidably hold the fate of their clients in their hands—by bearing the burden of making strategic decisions and organizing factual presentations that play a critical role in the outcome of the case. As a practical matter, a lawyer's legal research and argument also play an important role, but they are not dispositive because the court is responsible for discerning the correct legal principles and applying them to the client's case regardless of the lawyer's presentation. Under the Ninth Circuit's new rule, however, a client's case can be irretrievably lost simply because the lawyer fails to cite a relevant precedent in the brief—even when the acknowledged expert in the law, the appellate court, is convinced that the governing legal principles warrant a judgment in the client's favor.

There is no justification in policy or governing precedent for injecting these consequences into the civil justice system. Accordingly, this Court should firmly reject the Ninth Circuit's special rule restricting appellate courts to the universe of legal precedent cited by the plaintiff when they review dismissals of civil rights claims on qualified immunity grounds.

ARGUMENT

APPELLATE COURTS SHOULD DECIDE APPEALS FROM DISMISSALS OF SECTION 1983 ACTIONS ON QUALIFIED IMMUNITY GROUNDS WITH REFERENCE TO ALL APPLICABLE LEGAL PRECEDENTS, NOT JUST THOSE CITED BY THE PLAINTIFF TO THE DISTRICT COURT

A. The Ninth Circuit's Rule Contravenes Fundamental Tenets of Our Judicial System

1. *It is the Responsibility of the Court to Determine the Applicable Law*

The basic role of the judiciary has been settled since the early days of the Republic: "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Although made in the context of comparing the roles of the judicial and legislative branches, this statement also reflects an affirmative declaration of the role of judges in our system of government. The Founders were well aware that the judge's responsibility to determine and apply the law would be a difficult task, noting that judges will require "long and laborious study to acquire a competent knowledge of" the mass of legal precedent. *The Federalist No. 78*, at 529 (Hamilton) (J. Cooke ed., 1961). "Hence it is that there can be but few men in the society, who will have sufficient skill in the laws to qualify them for the stations of judges." *Id.*

In the current federal judicial system, the difficulty of discerning the law has led to a "hierarchy" in which litigants have the right to present their case to an appellate court that is presumed to be more expert in the law than the lower court. *See Hutto v. Davis*, 454 U.S. 370, 375 (1982). As Judge Kozinski pointed out in his dissent from denial of rehearing en banc (Pet. App. B at 582, 984 F.2d at 993), the courts of appeals are able to focus their attention on legal issues and thus to develop an

expertise that justifies their power to correct and overturn the trial court's conclusions of law.

To be sure, the judiciary does not perform this function unaided. In their role as advocates, lawyers provide the court with legal precedents to seek to persuade the court to rule for their clients. But lawyers also act as officers of the court in citing legal precedent and therefore are ethically bound to call the court's attention to even "directly adverse" precedent that is unknown to opposing counsel. Model Rules of Professional Conduct Rule 3.3(a)(3) (1992); *see also* Model Code of Professional Responsibility DR 7-106(B)(1) (1980).[2] The reason for this obligation is that "legal argument is a discussion seeking to determine the legal premises properly applicable to the case" (Model Rules of Professional Conduct, Rule 3.3 cmt. (1992))—a determination that ultimately remains the responsibility of the court.

The Code of Judicial Conduct (adopted by the ABA in 1972) confirms that the court is responsible for ascertaining the applicable legal principles, regardless of the parties' submissions. Canon 3A(4) suggests that, if necessary, a judge should seek "the advice of a disinterested expert on the law," and the comment recommends that the judge obtain this advice by inviting the expert to submit an amicus brief. Indeed, the ABA's Special Committee on Standards of Judicial Conduct felt so strongly about the need for a judge to exert every effort to find the law that the Reporter's Notes on the Code authorize a judge to obtain advice from legal experts even by telephone call. E. Wayne Thode, *Reporter's Notes to Code of Judicial Conduct* 54 (1973) (comment on Canon 3A(4)).

---

[2] The yardstick for measuring this obligation is whether "the decision which opposing counsel has overlooked [is] one which the court should clearly consider in deciding the case." Model Code of Professional Responsibility DR 7-106(B)(1) note 80 (1980) (quoting ABA Comm. on Professional Ethics and Grievances, Formal Op. 280 (1949)).

The Ninth Circuit's decision is at odds with this fundamental tradition of judicial responsibility. The court's rule *forces* the appellate court to abdicate its core judicial role. The appellate court is ordered *not* to search for legal precedent that would support the plaintiff's case. If the appellate court is aware of a legal precedent that the plaintiff has overlooked, the court is instructed to ignore that precedent. Instead, it must affirm an outcome that it knows is not in accordance with the governing legal principles. The Ninth Circuit's rule thus is antithetical to the primary function of an appellate court—namely, "to modify, reverse or remand decisions not in accordance with law." *Hormel v. Helvering*, 312 U.S. 552, 557 (1941).

2. *The Decision Below Confuses the Distinction Between Fact and Law*

The Ninth Circuit attempted to justify its departure from the norms of settled jurisprudence by describing the qualified immunity question as one involving "legal facts." As Judge Kozinski cogently explained in his dissent, this inventive phraseology cannot obscure the fact that the court of appeals has promulgated a new, and unsupportable, legal doctrine.

In our system of adjudication, there exist significant differences in the treatment of factual and legal issues. Facts are case-specific and must be demonstrated through the presentation of evidence. Law, by contrast, is external to any particular case, and disputes over the law do not entail the need for assessing the demeanor of witnesses or other functions that can be performed only by the trial court. For these and other reasons, appellate review of factual determinations is very limited, but appellate review of legal issues is de novo. *See generally* Pet. App. B at 582, 984 F.2d at 993 (Kozinski, J., dissenting).

Even the ethical obligations of lawyers reflect this fundamental distinction. As noted above, lawyers are obligated to assist the court in its determination of the

law by advising it of controlling precedent, even if that precedent is adverse to the lawyer's client. By contrast, lawyers have no such obligation to introduce evidence or otherwise apprise the court of a fact that would advance their adversary's position; indeed, to do so might well violate the ethical obligation of diligent representation. *See* Model Rules of Professional Conduct Rule 1.3 (1992); Model Code of Professional Responsibility DR 7-101(A)(3) (1980) (a lawyer may not "[p]rejudice or damage his client during the course of the professional relationship" except in the case of fraud).

The line between the two categories of fact and law is not always easy to draw, but that provides no basis for eliminating the distinction entirely as the Ninth Circuit has done. Essentially, the Ninth Circuit's rule treats a legal question as one of fact—by placing the responsibility to produce "evidence" (in the form of legal precedent) exclusively upon the plaintiff. That approach is jurisprudentially unsound.

There is no serious dispute that the aspect of qualified immunity involved here—determining what constitutional rights were clearly established at the time of the defendants' actions—is a question of law. This Court consistently has indicated that the qualified immunity inquiry is conducted solely by examining case law, describing it as an "essentially legal question." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). *See also Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Where legal precedent does not clearly establish the conduct in question as unlawful, the challenge to qualified immunity should be rejected "[a]s a matter of law." *Procunier v. Navarette*, 434 U.S. 555, 565 (1978). Indeed, the Ninth Circuit acknowledged below that the issue "presents a 'pure question[] of law.'" Br. in Opp. Exh. A at 6, 975 F.2d at 1392 (quoting *Romero v. Kitsap County*, 931 F.2d 624, 627-28 (9th Cir. 1991)). The court conceded that, accordingly, "our review is de novo." Br. in Opp Exh. A at 8, 975 F.2d at 1392.

The court of appeals sought to justify its decision to treat the qualified immunity question as one of "legal fact[]" by observing that the question is not "what the law *is*, but instead the question is whether the law with respect to a fact-specific set of circumstances *was* . . . 'clearly established.'" Br. in Opp. Exh. A at 11, 975 F.2d at 1394 (emphasis in original). But this observation provides no basis for shifting to the plaintiff the appellate court's traditional responsibility as the ultimate arbiter of the law. Contrary to the Ninth Circuit's assertion (*id.*), the qualified immunity issue is not dramatically different from other kinds of legal issues that courts frequently are asked to decide.

There is certainly nothing unusual about a court deciding what the state of the law *was* at some particular point in the past. For example, tax liability is based on the law in existence at the time the liability arose, and therefore courts reviewing tax cases almost invariably must disregard the current state of the law and instead determine what the law was many years earlier. By the same token, this Court has held that habeas corpus petitions should be judged according to the constitutional standard in effect at the time; a "new rule" does not provide a ground for issuing a writ of habeas corpus. *Penry v. Lynaugh*, 492 U.S. 302, 313-14 (1989); *Teague v. Lane*, 489 U.S. 288, 306 (1989).

Nor is it unique to the section 1983 context that the legal issue entails a judgment as to how firmly established is the state of the law. This Court has stated that the "'new rule' principle" announced in *Teague* "validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Butler v. McKellar*, 494 U.S. 407, 414 (1990). Exclusionary rule jurisprudence entails an inquiry into the objective reasonableness of an officer's conduct similar to that involved here. A Fourth Amendment violation does not require suppression of the seized evidence if the officer conducting the

search relied in "objective good faith" on a search warrant—a determination that rests on whether it should have been clear to the officer under existing law that the search was unconstitutional. *United States v. Leon*, 468 U.S. 897, 923 (1984). Indeed, this Court remarked in *Leon* that the objective good faith inquiry is somewhat "analogous" to the qualified immunity inquiry that arises in *Bivens* or section 1983 actions. *Id.* at 922 n.23.

Antitrust law contains another close analogy to the section 1983 inquiry. The "*Noerr-Pennington* doctrine" immunizes from antitrust liability legitimate efforts (including litigation) to influence governmental action, but the protection does not extend to "sham" activities. The test of legitimacy is whether the defendant made "an objectively reasonable effort to litigate." *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 113 S. Ct. 1920, 1926 (1993). As this Court's analysis in that case demonstrates, the nature of the inquiry into "objective reasonableness" is similar to the "clearly established" inquiry in section 1983 actions. This Court examined court of appeals and district court decisions in various circuits at the time the litigation in question was commenced, as well as the contemporaneous view of leading commentators, and it concluded that the law was sufficiently "unsettled" that the litigation could not be considered a sham. *See id.* at 1930. This Court also made plain that this aspect of the inquiry into the sham exception is one that should be decided by the court "as a matter of law," presumably without being restricted to the legal precedent cited by the parties. *Id.*

Thus, the qualified immunity inquiry in section 1983 cases is not unique. Yet in none of the other contexts in which courts are asked to determine the state of the law at some particular time is the appellate court supposed to treat a legal issue as one of fact, with the scope of its review confined to the legal precedent presented by the parties below. There simply is nothing about the nature

of the legal inquiry in section 1983 cases that justifies a special rule prohibiting the appellate court from looking at relevant case law. On the contrary, resolving this sort of inquiry is precisely the sort of duty "that appellate courts are expected to perform" because of their " 'special expertise and experience . . . in assessing the relative force of competing interpretations and applications of legal norms.' " *Pierce v. Underwood*, 487 U.S. 552, 584 (1988) (White, J., concurring in part and dissenting in part) (discussing review of district court award of attorneys' fees on the ground that the government's position was not "substantially justified") (quoting *Spencer v. NLRB*, 712 F.2d 539, 563 (D.C. Cir. 1983), *cert. denied*, 466 U.S. 936 (1984)).

B. The Ninth Circuit's Rule Undermines the Fair Administration of Section 1983 Cases

The Ninth Circuit's holding requiring appellate courts to abdicate ultimate authority to determine the law also threatens to inject practical difficulties into the administration of section 1983 litigation. More significantly, the rule will lead to anomalous and arbitrary results that will undermine the fairness of such litigation.

An important goal of our justice system is to " 'treat[] similarly situated [parties] the same.' " *Harper v. Virginia Dep't of Taxation*, 61 U.S.L.W. 4664, 4666 (U.S. June 18, 1993) (quoting *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987)). The decision below tramples on that principle. It forces the court of appeals to treat differently two parties who present the same claim for relief on indistinguishable facts, simply because one party cited a particular legal precedent in its papers below and the other party failed to do so.

The Ninth Circuit's rule not only yields inconsistent results; it also yields demonstrably incorrect results. Indeed, by definition, the only time the rule will affect the outcome of a case will be when it causes the appellate

court to reach a result that is contrary to law by ignoring a precedent not cited by the plaintiff. It is one thing for a court to reach the wrong result *unwittingly* because a lawyer's research is faulty and the court does not discover the correct law on its own. That is an unfortunate outcome, but an essentially unavoidable consequence of human frailty. It is quite another matter for a court familiar with the governing law to reach the wrong result *knowingly*, just because the lawyer's research in the district court is faulty. Our justice system should not countenance a doctrine that, with no compelling justification, requires a court deliberately to refuse to do justice to the parties before it.

The Ninth Circuit stated that its restriction on the judicial use of precedent would be limited to appellate courts, but the district court would remain free to rely upon precedents not cited by the plaintiff. Br. in Opp. Exh. A at 15-16, 975 F.2d at 1396. But this power of the district court to supplement the plaintiff's authority throws another "wild card" into the mix that can yield different outcomes for similarly situated plaintiffs, depending upon the fortuity of which trial judge is assigned to the case. Two different trial courts could engage in different independent legal analyses that yield disparate outcomes on indistinguishable facts, yet the appellate court would be powerless to harmonize those outcomes.

Another difficulty with the decision below stems from a question that it leaves unanswered—whether the limitation on appellate review extends to precedents that support the defendant's legal position. The result is unsatisfactory no matter how this question is answered. If the limitation does extend to cases that support the qualified immunity claim, the rule raises the specter of public officials being held individually liable for damages in circumstances where the appellate court is aware that they should be immune under a correct reading of the

law. If the limitation is not so extended, the Ninth Circuit's rule is unreasonably skewed against civil rights plaintiffs.[3]

Finally, the Ninth Circuit's rule unnecessarily places additional pressure on defense lawyers in section 1983 cases. As Judge Kozinski noted in his dissent, the decision below, coupled with the lawyer's ethical obligation to disclose adverse precedent, places counsel in an extremely uncomfortable position with respect to the client relationship. *See* Pet. App. B at 593-94; 984 F.2d at 998-99. Ordinarily, where the appellate court is free to consider all legal precedents, the lawyer's disclosure should not be expected to change the ultimate outcome of the litigation. In this context, however, compliance with the rules of ethics by the defendant's lawyer can transform the case from certain victory for the defense (because the plaintiff would have failed to carry the burden of proving "legal facts") to certain defeat if the precedent is sufficiently on point.

More generally, the fact that a client's legitimate claim can fail because of the lawyer's omission of one citation greatly adds to the pressure that a lawyer inevitably faces when he or she is responsible for a client's case. There is no reason why a lawyer in a section 1983 case should not have this pressure diffused, as it would be in any other kind of case, by the prospect that the appellate court will correctly apply the law even if the lawyer's brief is missing a citation.

---

[3] The rule also opens the door to a new set of issues for litigation that could plague the administration of section 1983 cases—namely, how clearly does the plaintiff have to rely upon a case before the court of appeals can consider it. Is it enough for the plaintiff merely to cite the case in the brief? What if the case is mentioned only as part of a string citation? What if the precedent is cited, but for the wrong proposition? Arguably, a cryptic citation would not be viewed as sufficient to carry the plaintiff's burden of proving the necessary "legal facts."

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded.

Respectfully submitted,

R. WILLIAM IDE III *
President,
American Bar Association
ALAN I. HOROWITZ
ANTHONY F. SHELLEY
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000

AUGUST 1993

* *Counsel of Record*

No. 92-8579

AUG 27 1993
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

CHARLES K. ELDER, PETITIONER

v.

R. D. HOLLOWAY, ET AL., RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

STEVEN R. SHAPIRO
American Civil Liberties Union Foundation
132 West 43 Street
New York, NY 10036
(212) 944-9800

ANDREW J. PINCUS*
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0628

**Counsel of Record*

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether an appellate court evaluating an immunity defense in an action under 42 U.S.C. § 1983 may consider only the legal authorities cited to the district court -- and must ignore relevant precedents cited for the first time on appeal or disclosed by the court's own research -- in deciding whether the constitutional right allegedly violated by the defendant was "clearly established."

TABLE OF CONTENTS

Page

INTEREST OF THE AMICUS CURIAE 1

STATEMENT 2

SUMMARY OF ARGUMENT 4

ARGUMENT 6

AN APPELLATE COURT MAY NOT IGNORE RELEVANT LEGAL AUTHORITIES IN DETERMINING WHETHER A SECTION 1983 DEFENDANT IS ENTITLED TO QUALIFIED IMMUNITY 6

A. This Court's Precedents Leave No Doubt That A Court Is Not Restricted To The Parties' Presentation In Deciding Whether A Particular Legal Rule Was Clearly Established 8

1. Courts May Consider Authorities Not Cited By The Parties In Resolving Disputes Regarding Questions Of Law 8

2. Whether A Section 1983 Defendant Is Entitled To Immunity From Damages On The Ground That The Plaintiff's Legal Right Was Not Clearly Established Is A Question Of Law 11

3. The Justifications Advanced By The Ninth Circuit For Its Contrary Approach Do Not Withstand Scrutiny 13

B. The Ninth Circuit Rule Should Be Rejected Because It Would Distort The Judicial Process. 16

CONCLUSION 19

TABLE OF AUTHORITIES

Cases:

	Page
Anderson v. *Creighton*, 483 U.S. 635 (1987)	6, 7, 12
Chevron Oil Co. v. *Huson*, 404 U.S. 97 (1971)	15, 16
Davis v. *Scherer*, 468 U.S. 183 (1984)	5, 13, 14
Dixon v. *Richer*, 922 F.2d 1456 (10th Cir. 1991)	12
Dominique v. *Telb*, 831 F.2d 673 (6th Cir. 1987)	12
Gardner v. *The Collector*, 73 U.S. (6 Wall.) 499 (1853)	9
Hanley v. *Donoghue*, 116 U.S. 1 (1885)	10
Harlow v. *Fitzgerald*, 457 U.S. 800 (1982)	3, 6, 7, 11, 14
Harper v. *Virginia Dep't of Taxation*, 61 U.S.L.W. 4664 (U.S. June 18, 1993)	16
Hunter v. *Bryant*, 112 S. Ct. 534 (1991)	12
Kamen v. *Kemper Financial Services, Inc.*, 111 S. Ct. 1711 (1991)	11
Lamar v. *Micou*, 114 U.S. 218 (1885)	10
Liverpool Steam Co. v. *Phenix Ins. Co.*, 134 U.S. 397 (1889)	10
Miller v. *Fenton*, 474 U.S. 104 (1985)	9
Mitchell v. *Forsyth*, 472 U.S. 511 (1985)	5, 11
Owen v. *City of Independence*, 445 U.S. 622 (1980)	7, 16, 18
Owings v. *Hull*, 34 U.S. (9 Pet.) 606 (1835)	10

TABLE OF AUTHORITIES - Continued

	Page
Pierce v. *Underwood*, 487 U.S. 552 (1988)	9
Pullman-Standard v. *Swint*, 456 U.S. 273 (1982)	9
Schultz v. *Tecumseh Products*, 310 F.2d 426 (6th Cir. 1962)	10
Siegert v. *Gilley*, 111 S. Ct. 1789 (1991)	12
Stump v. *Sparkman*, 435 U.S. 349 (1978)	7
Teague v. *Lane*, 489 U.S. 288 (1989)	15, 16
Town of South Ottawa v. *Perkins*, 94 U.S. 260 (1877)	10, 13
United States National Bank of Oregon v. *Independent Insurance Agents*, 113 S. Ct. 2173 (1993)	11
United States v. *Al-Azzawy*, 784 F.2d 890 (9th Cir. 1985)	3, 4

Statutes:

42 U.S.C. § 1983	1, 2, 6, 17
42 U.S.C. § 1988	17
Fed. R. Civ. P. 52(a)	9
S. Rep. No. 1011, 94th Cong., 2d Sess. 2-3 (1976)	17

Miscellaneous:

9 C. Wright & A. Miller, Federal Practice and Procedure § 2583 (1971)	9

TABLE OF AUTHORITIES - Continued

Page

Sheldon H. Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983* § 8.16 (2d ed. 1986) 12

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-8579

CHARLES K. ELDER, PETITIONER

v.

R. D. HOLLOWAY, ET AL., RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and civil rights laws. Since its founding, the ACLU has been particularly concerned with the ability of individuals to obtain redress for violations of their federal constitutional rights. The ACLU has, therefore,

appeared before this Court in numerous cases concerning the scope of the federal civil rights laws, both as counsel for parties and as amicus curiae.

This Court has held that government officials sued under 42 U.S.C. § 1983 are divested of their qualified immunity from damages liability if they are shown to have violated clearly established constitutional rights. The present case brings before the Court an important question regarding the procedural rules governing civil rights plaintiffs' challenges to state officials' qualified immunity defenses. The rule adopted by the Ninth Circuit bars appellate courts from considering cases other than those cited to the district court in evaluating the defendant's entitlement to immunity. That approach, if upheld by this Court, would raise the distinct possibility that the success of a plaintiff's Section 1983 claim would be measured more by the abilities of that plaintiff's lawyer than by the relevant law, and would allow government defendants to avoid liability for unconstitutional acts that violate clearly established law.[1]

STATEMENT

Respondents, all of whom are police officers employed by the Ada County Sheriff's Office, arrested petitioner without a warrant on the porch of the house in which petitioner was living.[2] Petitioner subsequently commenced this action under 42 U.S.C. § 1983 seeking damages on the ground that the arrest on his porch constituted a constructive entry of his home without a warrant, and therefore violated his Fourth Amendment rights. *Elder* v. *Holloway*, 975 F.2d 1388, 1390 (9th Cir. 1992), cert. granted, No. 92-8579.

---

[1] Letters from the parties consenting to the filing of this brief have been lodged with the Clerk of this Court pursuant to Sup. Ct. R. 37.3.

[2] Petitioner was wanted in the State of Florida.

Respondents filed a motion for summary judgment claiming immunity from liability for damages on the ground that their conduct did not violate any "clearly established" constitutional rights of petitioner. See *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). In response, petitioner proffered three cases to demonstrate that the law regarding constructive entries had been clearly established at the time of his arrest, and that respondents' actions had in fact constituted such an entry.

The district court granted respondents' motion for summary judgment, holding that "the law is not clear--in fact, the court has found no controlling Idaho or Ninth Circuit case law--on the issue." Pet. App. C at 21. The court found that respondents therefore had not violated petitioner's clearly established rights by making the arrest on his porch. *Id.* at 21-22.

The court of appeals affirmed. It agreed with the district court that none of the cases cited by petitioner established that an arrest in circumstances such as those in this case violated the Fourth Amendment. 975 F.2d at 1391.

The court observed, however, that a Ninth Circuit case not cited by petitioner and not considered by the district court -- *United States* v. *Al-Azzawy*, 784 F.2d 890 (9th Cir. 1985), cert. denied, 476 U.S. 1144 (1986) -- might point toward a different result. 975 F.2d at 1391. The court nevertheless declined to consider that decision on the ground that "'[t]he plaintiff bears the burden of proof that the right allegedly violated was clearly established at the time of the alleged misconduct.'" *Id.* at 1392 (citation omitted). In fulfilling that burden, the court concluded, a Section 1983 plaintiff is responsible for "identify[ing] the universe of statutory or decisional law from which the court can determine whether the right allegedly violated was clearly established." 975 F.2d at 1393. Because petitioner failed to bring the *Al-Azzawy* decision to the attention of the district court, the court

of appeals determined it could not consider the case. 975 F.2d at 1393-1395.[3]

SUMMARY OF ARGUMENT

The disposition of this case by the court of appeals is truly remarkable. In the course of deciding what the court acknowledged to be a question of law -- whether the constitutional rights allegedly violated by respondents were clearly established at the time of the conduct in question -- the court refused to consider one of its own precedents on the ground that the decision had not been cited to the district court. The court went on to hold that petitioner's claim was barred by qualified immunity. In the court of appeals' view, the excluded precedent could not influence its deliberations, *even if that precedent established beyond any doubt that the constitutional right invoked by petitioner was clearly established and that respondents therefore should not have been accorded immunity from damages liability*. That novel limitation on the power of a court to resolve questions of law has no basis in precedent or common sense.

First, it is well settled that appellate courts may base their decisions regarding questions of law on authorities not cited to the district court. Indeed, appellate courts may, and

---

[3] Although the court of appeals panel suggested in its amended opinion that even if it were to consider *Al-Azzawy*, the decision would not be determinative of the constructive entry issue (975 F.2d at 1396), Judge Kozinski dissented, agreeing with the panel's initial conclusion that the case "applies directly to the claim of qualified immunity raised by the defendants here" (984 F.2d 991, 992 n.1 (9th Cir. 1993) (dissent from denial of rehearing en banc)). He observed that "if *Al-Azzawy* did not change the legal landscape enough to defeat a claim of qualified immunity, it would have been far simpler to dispose of the case on that basis." *Ibid.*

frequently do, rely on authorities -- or entire legal theories -- never mentioned by the parties at all.

Second, this Court has made clear that the qualified immunity inquiry -- whether the defendant violated clearly established rights of the plaintiff -- is "a question of law." *Mitchell* v. *Forsyth*, 472 U.S. 511, 528 (1985). Indeed, the Court has emphasized that it is a "purely legal" issue. *Id.* at 528 n.9. For that reason, a court should treat the immunity question like any other question of law and determine the proper answer for itself by looking to any relevant authority it can discover.

Third, contrary to the Ninth Circuit's apparent belief, this Court has never endorsed the arbitrary limitation on the immunity inquiry formulated in this case. By stating that a plaintiff may overcome a qualified immunity defense "only by showing that those rights [violated by the defendant] were clearly established at the time of the conduct at issue" (*Davis* v. *Scherer*, 468 U.S. 183, 197 (1984)), the Court did not mean to limit the legal authorities that could be consulted by the appellate court. The phrase in *Davis* means simply that the plaintiff may prevail only if he convinces the court that his claim is well-grounded in law. The plaintiff must, of course, put forward legal arguments directed toward that end, but the court remains free to look to other authorities in resolving the legal issues.

Fourth, there is no policy justification for the Ninth Circuit's novel rule. Rather, the effect of this "justice with blinders" approach would be to diminish respect for the legal system, making the outcome of a case dependent more on the skill of the attorneys involved than on the merits of the claims. It also would reduce the deterrent effect of the Section 1983 remedy, because government officials who violate clearly established rights will not be required to answer in damages. This Court should reject the Ninth Circuit's approach and reaffirm that courts have unfettered authority to

determine what the law is in this area, as they do with respect to every other issue of law that comes before them.

ARGUMENT

AN APPELLATE COURT MAY NOT IGNORE RELEVANT LEGAL AUTHORITIES IN DETERMINING WHETHER A SECTION 1983 DEFENDANT IS ENTITLED TO QUALIFIED IMMUNITY

This Court has recognized that "[w]hen government officials abuse their offices, 'action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees.'" *Anderson* v. *Creighton*, 483 U.S. 635, 638 (1987) (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982)). Indeed, the Reconstruction-era statute now codified at 42 U.S.C. § 1983 was enacted "to provide protection to those persons wronged by the '[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *Owen* v. *City of Independence*, 445 U.S. 622, 650 (1980) (citations and internal quotation marks omitted). Because the damages remedy accomplishes both compensation and deterrence, it is "a vital component of [the] * * * scheme for vindicating cherished constitutional guarantees." *Id.* at 651.

The Court has also observed, however, that "permitting damages suits against government officials can entail substantial social costs" (*Anderson*, 483 U.S. at 638), and has "accommodated these conflicting concerns by generally providing government officials performing discretionary functions with a qualified immunity." *Ibid.*[4] Specifically,

[4] In certain limited circumstances, narrow categories of government officials, such as judges and legislators, are protected by an unqualified immunity for their official acts. See, *e.g.*, *Stump* v. *Sparkman*, 435 U.S. 349, 356 (1978) (judicial immunity).

the Court has held that government officials may be held liable in damages only when their conduct "violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818.

The question in this case relates to the procedure courts should use in determining whether the constitutional right invoked by the plaintiff was "clearly established" at the time the allegedly unlawful conduct occurred. According to the Ninth Circuit, the plaintiff's arguments regarding that question amount to "legal facts" and neither the court of appeals nor this Court may look beyond the authorities contained in those arguments to ascertain the state of the law at the time of the events in question.

We submit that the Ninth Circuit's approach is manifestly wrong. It is well settled that courts are not restricted to the submissions of the parties in resolving questions of law, and this Court has clearly stated that whether a particular legal rule was "clearly established" is a question of law. Moreover, all relevant policy considerations weigh strongly in favor of permitting courts to exercise their traditional independence in resolving the questions of law involved in an immunity dispute.

A. This Court's Precedents Leave No Doubt That A Court Is Not Restricted To The Parties' Presentation In Deciding Whether A Particular Legal Rule Was Clearly Established.

The answer to the procedural question addressed by the court of appeals is dictated by two propositions that are so well settled as to be beyond dispute. The first is that in resolving a question of law, a court may consider any authority that it deems relevant, whether or not that authority was brought to its attention by the parties. The second is that the determination whether a legal rule was clearly established, and therefore whether the defendant government official is

entitled to immunity from damages liability, is a question of law to be decided by the court. For that reason, the trial court -- and any appellate courts reviewing the case -- may examine all authorities they deem relevant in resolving the matter.

1. Courts May Consider Authorities Not Cited By The Parties In Resolving Disputes Regarding Questions Of Law.

The "appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive." *Miller* v. *Fenton*, 474 U.S. 104, 113 (1985); see also *Pullman-Standard* v. *Swint*, 456 U.S. 273, 288 (1982) (referring to the "vexing nature of the distinction between questions of fact and questions of law"). But much effort has been devoted to distinguishing the two types of issues precisely because the distinction, once made, carries great significance: the nature and extent of the appellate court's power of review differs sharply depending upon whether the issue is one of law or one of fact.

Decisions of fact are subject to deferential review (see, *e.g.*, Fed. R. Civ. P. 52(a)) and the appellate court is generally confined to the record developed by the parties in the court below. See 9 C. Wright & A. Miller, Federal Practice and Procedure § 2583, at 725 (1971) ("a court of appeals will consider only those findings of fact * * * that are signed by the trial judge and filed as part of the record on appeal").

With respect to issues of law, however, the appellate court exercises considerably more leeway. Its review is *de novo*. See *Pierce* v. *Underwood*, 487 U.S. 552, 558 (1988). And, in exercising its *de novo* review, the court is not limited to the legal authorities presented by the parties. It may "resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and

satisfactory answer to such question[s]." *Gardner* v. *The Collector*, 73 U.S. (6 Wall.) 499, 511 (1868).

That rule is reflected in this Court's repeated recognition that federal courts must consider all relevant law regardless of whether the parties have presented such authority to the court. See *Lamar* v. *Micou*, 114 U.S. 218, 223 (1885) ("[t]he law of any State of the Union, whether depending upon statutes or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof"); accord *Liverpool & Great Western Steam Co.* v. *Phenix Ins. Co.*, 129 U.S. 397, 445 (1889); *Hanley* v. *Donoghue*, 116 U.S. 1, 6 (1885); *Owings* v. *Hull*, 34 U.S. (9 Pet.) 607, 624-625 (1835); *Schultz* v. *Tecumseh Prods.*, 310 F.2d 426, 433 (6th Cir. 1962) ("counsel's failure to cite law of which a United States Court must take judicial notice, and which controls the disposition of the case, does not render such law inapplicable or prevent reliance upon it on appeal").

Certainly this Court and the federal courts of appeals routinely rely upon authorities not cited by the parties; indeed, upon entire legal theories not advanced by the parties. Outlawing that practice would obstruct the orderly development of the law by requiring courts to base their rulings on an artificially circumscribed universe of precedent. "It would be an intolerable state of things if a * * * [particular judicial opinion] could thus be a law in one case and for one party, and not a law in another case and for another party; a law to-day, and not a law to-morrow; a law in one place, and not a law in another." *Town of South Ottawa* v. *Perkins*, 94 U.S. 260, 267 (1877).

In sum, restricting courts to considering only those cases that the parties have "proved" would infringe the courts' "independent power to identify and apply the proper construction of governing law." *United States Nat'l Bank of Oregon* v. *Independent Insurance Agents*, 113 S. Ct. 2173,

2178 (1993) (quoting *Kamen* v. *Kemper Financial Servs., Inc.*, 111 S. Ct. 1711, 1718 (1991)). As long as "an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties." *Kamen*, 111 S. Ct. at 1718.

2. Whether A Section 1983 Defendant Is Entitled To Immunity From Damages On The Ground That The Plaintiff's Legal Right Was Not Clearly Established Is A Question Of Law.

This Court has recognized many times that determining whether the defendant violated "clearly established" law is a question of law to be resolved by the trial court. In the decision that first announced that immunity standard -- *Harlow* v. *Fitzgerald*, *supra* -- the Court observed that "[o]n summary judgment, *the judge appropriately may determine*, not only the currently applicable law, but *whether that law was clearly established at the time an action occurred*." 457 U.S. at 818 (emphasis added).

Three years later, in holding that a district court's denial of qualified immunity is immediately appealable, the Court observed that the immunity determination turns "on the resolution of the *essentially legal question* whether the conduct of which the plaintiff complains violated clearly established law." *Mitchell*, 472 U.S. at 526 (emphasis added). The Court went on to characterize that issue as "a question of law"; indeed, the Court emphasized that it is a "purely legal" issue. *Id.* at 528 n.9. Accord, *Hunter* v. *Bryant*, 112 S. Ct. 534, 537 (1991); *Siegert* v. *Gilley*, 111 S. Ct. 1789, 1793 (1991); see also Sheldon H. Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983* § 8.16, at 511 (2d ed. 1986) ("whether clearly settled

law existed at the time a defendant acted is an issue of law for the court").[5]

Not surprisingly, the lower courts have followed this Court's directive. Even the Ninth Circuit recognized in its decision in this case that "'[t]he determination of whether [a] right was so clearly established as to alert a reasonable officer to its constitutional parameters' presents a 'pure question of law.'" 975 F.2d at 1392 (quoting *Romero* v. *Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991)). See also *Dominique* v. *Telb*, 831 F.2d 673, 676 (6th Cir. 1987) (the court "must decide the *purely legal question* of whether the law at the time of the alleged action was clearly established in favor of the plaintiff") (emphasis added); *Dixon* v. *Richer*, 922 F.2d 1456, 1460 (10th Cir. 1991) (because "[t]he claim of qualified immunity presents a question of law[,] the court cannot avoid the question by framing it as a factual issue") (citation omitted).

Because the determination whether the official violated clearly established law is itself a question of law, courts are entitled to look beyond the submissions of the parties in resolving that question. In this context, as with any other question of law, "[t]hat which purports to be a law * * * is a law, or it is not a law, according as the truth of the fact

---

[5] As the Court observed in *Anderson* v. *Creighton*, *supra*, the determination whether a government official is entitled to immunity may involve a fact-specific inquiry. That is especially true where -- as in *Anderson* and in the present case -- the official is alleged to have violated the Fourth Amendment. 483 U.S. at 641. But the ultimate question is still one of law: "whether a reasonable officer could have believed [the official's] warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed." *Ibid.*

may be, and not according to the shifting circumstances of parties." *Town of South Ottawa*, 94 U.S. at 267.

3. The Justifications Advanced By The Ninth Circuit For Its Contrary Approach Do Not Withstand Scrutiny.

The Ninth Circuit relied on two factors in concluding that it could consider only those legal authorities cited to the district court. First, it invoked this Court's decision in *Davis* v. *Scherer*, 468 U.S. 183 (1984); second, it pointed to alleged differences between the inquiry into clearly established law and other legal questions. Neither factor provides a shred of support for the Ninth Circuit's approach.

This Court stated in *Davis* that a plaintiff may overcome a qualified immunity defense "only by showing that those rights [violated by the defendant] were clearly established at the time of the conduct at issue." *Id.* at 197. Characterizing this phrase as imposing a "burden of proof" on the civil rights plaintiff to demonstrate a violation of clearly established law, the Ninth Circuit asserted that "[r]equiring the plaintiff to identify the universe of authority that is relevant to the fact-specific right allegedly violated follows naturally from this direction." 975 F.2d at 1393.

But this Court's statement in *Davis* had nothing whatever to do with burdens of proof. It simply reiterated the legal standard regarding immunity that the Court enunciated in *Harlow*: government officials are entitled to immunity unless the court determines that the constitutional rights in question were clearly established. Just as the plaintiff must "show" that the facts alleged in the complaint make out a violation of the plaintiff's constitutional rights, the plaintiff also must "show" that those rights were clearly established.

Had this Court intended to distinguish the qualified immunity inquiry from other questions of law, it surely would have spoken with greater clarity. The phrase in *Davis*

provides no indication that the Court was subjecting civil rights plaintiffs to the extraordinary burden -- unknown in any other area of the law -- of putting before the court all authorities relevant to this legal determination. Similarly, the opinion contains no hint that the Court meant to circumscribe appellate courts' traditional authority to consider materials uncovered through their own research in deciding questions of law.

Properly understood, therefore, the phrase in *Davis* means simply that the plaintiff may prevail only if he establishes that his claim is well-grounded in law. As with other questions of law, the plaintiff is expected to put forward arguments in support of his position. However, as with other questions of law, the court remains free to look to other authorities in resolving the legal issues.

The Ninth Circuit also sought to distinguish the inquiry at issue here from other legal questions, contending that "declar[ing] what the law is" differs from "determining what the law with respect to an alleged constitutional right was, and how clear it was." 975 F.2d at 1394. Although the two types of inquiries plainly differ to some degree (the latter is backward looking, while the former is not), the court of appeals did not explain why that difference would justify forcing appellate courts to put on blinders when addressing the defendant's entitlement to immunity. We can think of no reason for such a severe limitation.

Indeed, there are a number of other contexts in which courts must make determinations about what the law was. Under *Teague* v. *Lane*, 489 U.S. 288, 310 (1989) (plurality opinion), only "new" constitutional rules apply retroactively to criminal cases on collateral review; the court accordingly must determine whether or not the rule advocated by the defendant would qualify as "new" when viewed against past precedent. Similarly, in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106 (1971), the Court determined whether a decision

should be applied retroactively by considering if it "establish[ed] a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed" (citation omitted).[6] And no one has ever suggested that courts deciding these issues are limited to cases cited by the parties, with the result that a rule may be held to be "new" under *Teague* with respect to a defendant in one case but not with respect to defendants in other cases.[7]

In sum, there is no basis for distinguishing the immunity inquiry from any other question of law. Courts should be free to consider the results of their own investigations into the relevant caselaw in ruling on those questions.

B. The Ninth Circuit Rule Should Be Rejected Because It Would Distort The Judicial Process.

The Ninth Circuit's approach is not merely unsound as a matter of precedent; it also is quite unsound as a matter of policy. First, the court of appeals' approach appears to rest

---

[6] The Court's determination in *Harper* v. *Virginia Dep't of Taxation*, 61 U.S.L.W. 4664 (U.S. June 18, 1993) (No. 91-794), that *Chevron* may not in some circumstances supply the proper standard for determining whether a decision should be applied retroactively does not undercut the point here: when the Court has applied the *Chevron* test it has not distinguished the legal questions that arise under that standard from other questions of law.

[7] The court of appeals suggested (975 F.2d at 1395) that its approach was analogous to an appellate court's refusal to consider a challenge to jury instructions as to which there was no objection or invited error. But Federal Rule of Civil Procedure 51 expressly requires objection in order to preserve instructional error for appeal. There is no similar rule governing the question of immunity in Section 1983 cases.

upon a "sporting" theory of legal advocacy that is especially inappropriate in the context of Section 1983, a statute that is remedial in nature and is designed to aid in the "'preservation of human liberty and human rights.'" *Owen* v. *City of Independence*, 445 U.S. at 636 (quoting Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871) (Rep. Shellabarger)). The Ninth Circuit rule would make the outcome of a case dependent more on the skill of the attorneys involved than on the merits of the claims. No longer could an appellate judge supplement counsel's inadequate investigation of the governing law. Thus, claims asserted by two similarly situated plaintiffs might well meet different fates, with the only difference being the skill of the lawyers.

The burden of such a rule is likely to fall more heavily on plaintiffs than defendants. Typically, plaintiffs have fewer legal resources at their disposal than do the government officials who are defendants in Section 1983 cases. (Indeed, in many cases defendants' counsel are paid by the government entity that employs the defendant.) That is why Congress found it necessary to provide the incentive of an award of attorneys' fees in successful Section 1983 cases. See 42 U.S.C. § 1988; S. Rep. No. 1011, 94th Cong., 2d Sess. 2-3 (1976). And plaintiffs rely more heavily on case law than defendants in qualified immunity cases -- the only way a plaintiff can defeat a qualified immunity defense is by demonstrating that clearly established law exists.[8]

---

[8] As Judge Kozinski noted, however, "[t]he chaotic effects of the * * * [Ninth Circuit] rule will not be visited solely on plaintiffs." 984 F.2d at 998 (dissenting from denial of rehearing en banc). If a defendant fails to cite a decision revealing a split in authority, the appellate court "would be powerless to reverse the unjust imposition of liability on a government officer." *Ibid.*

The Ninth Circuit's approach would thus produce a procedure that is precisely the opposite of our ideal of a judicial system that metes out justice on the basis of merit of the legal claim. While it is an unfortunate truth that resources may make a difference in the outcome of a case, the Ninth Circuit's rule would further exacerbate that problem without providing any countervailing benefit.

Second, the conflicting results that would be the inevitable byproduct of the Ninth Circuit's approach would lead to a waste of judicial resources and a diminution in respect for the courts. Qualified immunity decisions would no longer form a coherent body of precedent because "[e]very qualified immunity decision will be limited to its particular 'facts,' a term now defined to include" the cases cited by the parties. 984 F.2d at 999 (Kozinski, J., dissenting from denial of rehearing en banc). A subsequent action involving the same legal question would have to be decided without reference to the prior opinion if different precedents were cited before the district court. And the inconsistent results -- virtually impossible to explain to a public that expects "the law" to have one consistent meaning -- would diminish public confidence in the courts.

Third, Section 1983 "was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well." *Owen*, 445 U.S. at 651. Society therefore has a strong interest in ensuring that immunity is not erroneously granted to officials who violate clearly established rights; to the contrary, damages are necessary in such cases in order to deter future wrongdoing. By shifting the immunity inquiry away from the actual body of law governing a particular topic, and to the limited group of precedents that a civil rights plaintiff is able to discover on his own, the Ninth Circuit's approach significantly increases the chances of erroneous immunity decisions. That, in turn, means that defendants who should be subjected to damages liability will instead

obtain immunity. A system that fails to punish wrongdoers will obviously have a diminished deterrent effect. Even more egregiously, this lessened deterrence is not balanced by *any* corresponding benefit.

In sum, all of the relevant policy considerations favor reaffirmation of the courts' plenary authority to decide questions of law.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

Respectfully submitted.

STEVEN R. SHAPIRO
American Civil Liberties Union Foundation
132 West 43 Street
New York, NY 10036
(212) 944-9800

ANDREW J. PINCUS*
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0628

**Counsel of Record*

AUGUST 1993

(10)

Supreme Court, U.S.
FILED
SEP 29 1993
OFFICE OF THE CLERK

No. 92-8579

In The

Supreme Court of the United States

October Term, 1993

CHARLES K. ELDER,

Petitioner,

vs.

R.D. HOLLOWAY, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICI CURIAE OF THE STATES OF HAWAII, DELAWARE, IDAHO, ILLINOIS, KANSAS, MASSACHUSETTS, MONTANA, PENNSYLVANIA, RHODE ISLAND, VERMONT, WYOMING AND THE TERRITORY OF AMERICAN SAMOA IN SUPPORT OF RESPONDENTS

ROBERT A. MARKS
Attorney General
State of Hawaii

STEVEN S. MICHAELS*
Deputy Attorney General
State of Hawaii
*Counsel of Record

425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1365

Counsel for Amicus Curiae State of Hawaii [Other counsel listed on inside front cover]

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

26 pp

Charles M. Oberly III
Attorney General of Delaware
820 N. French Street
Wilmington, Delaware 19801
(302) 577-3838

Larry EchoHawk
Attorney General of Idaho
State House Room 207
Boise, Idaho 83720-1000
(208) 334-2400

Roland W. Burris
Attorney General of Illinois
Office of the Attorney General
State of Illinois Center
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3000

Robert T. Stephan
Attorney General of Kansas
Kansas Judicial Center, 2nd Floor
Topeka, Kansas 66612-1597
(913) 296-2215

Scott Harshbarger
Attorney General of Massachusetts
One Ashburton Place
Boston, Massachusetts 02108-1698
(617) 727-2200

Joseph P. Mazurek
Attorney General of Montana
Justice Building
215 North Sanders
Helena, Montana 56920
(406) 444-2026

Ernest D. Preate, Jr.
Attorney General of Pennsylvania
15th Floor, Strawberry Square
Harrisburg, Pennsylvania 17120
(717) 783-1471

Jefferey B. Pine
Attorney General of Rhode Island
72 Pine Street
Providence, Rhode Island 02903
(401) 274-4400

Jeffrey L. Amestoy
Attorney General of Vermont
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609-1001
(802) 828-3171

Joseph B. Meyer
Attorney General of Wyoming
123 State Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841

Malaetasi Togafau
Attorney General of American Samoa
Post Office Box 7
Pago Pago, American Samoa 96799
(684) 633-4163

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly affirmed the District Court's grant of summary judgment on the issue of qualified immunity in the case of a federal plaintiff who was arrested on probable cause, but without a warrant, on his front porch, in that the relevant precedent, *i.e., Payton v. New York,* 445 U.S. 573 (1980), does not "clearly establish" federal constitutional law in the "particularized" and "relevant" sense necessary to overcome defendants' qualified immunity from suit, as established by *Harlow v. Fitzgerald,* 457 U.S. 800 (1982)?

2. Whether, assuming, *arguendo,* that questions left unresolved by this Court's precedents can still generate "clearly established law" for purposes of qualified immunity analysis, the decision of the Court of Appeals now at the heart of Petitioner's attack on the judgment, *i.e., United States v. Al-Azzawy,* 784 F.2d 890 (9th Cir. 1985), *cert. denied,* 476 U.S. 1144 (1986), should be deemed to have made "clearly established law" that, if properly presented, would warrant denial of immunity?

3. Whether, if the foregoing do not dictate affirmance, the failure by Petitioner's counsel in any way to bring the ruling in *Al-Azzawy* to the attention of the District Court, and Petitioner's express concession in the Court of Appeals that *Al-Azzawy* is "distinguishable," requires affirmance in this case?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI CURIAE	1
STATEMENT OF THE CASE	4
ARGUMENT	4
A. Because the Issue of Whether Defendants are Entitled to Qualified Immunity is Plainly Included Within the Question Presented for Review, This Court Should First Address Whether, Irrespective of Petitioner's Counsel's Failure in the District Court, The Judgment Granting Immunity is Correct; On Such Review, the Court Should Affirm the Judgment	4
B. If the Court Reaches the Issue Whether Petitioner Should Be Held Accountable for His Counsel's Failure Adequately to Brief the Immunity Issue in the District Court, This Court Should Nonetheless Affirm the Ninth Circuit	14
CONCLUSION	18

TABLE OF AUTHORITIES

	Page(s)
CASES:	
Anderson v. Creighton, 483 U.S. 635 (1987)	2, 6, 11
Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985)	12
Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988)	16
Black v. Cutter Laboratories, 351 U.S. 292 (1956)	4
Burns v. Reed, 111 S. Ct. 1934 (1991)	5, 14
Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984)	4
Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990)	7, 11
Davis v. Scherer, 468 U.S. 183 (1984)	2, 5
Dewey v. Des Moines, 173 U.S. 193 (1899)	16
Hagans v. Lavine, 415 U.S. 528 (1974)	9
Harlow v. Fitzgerald, 457 U.S. 800 (1982)	*passim*
Hunter v. Bryant, 112 S. Ct. 534 (1991) (per curiam)	2, 7
Hutto v. Davis, 454 U.S. 370 (1982)	13
INS v. Delgado, 466 U.S. 210 (1984)	8
J.E. Riley Investment Co. v. Commissioner, 311 U.S. 55 (1940)	4
Leatherman v. Tarrant County Narcotics Unit, 113 S. Ct. 1160 (1993)	15, 16
Lum v. Jensen, 876 F.2d 1385 (9th Cir. 1989)	12
Malley v. Briggs, 475 U.S. 535 (1985)	2, 5, 14
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)	16

TABLE OF AUTHORITIES – Continued

Page(s)

Martin v. Hunter's Lessee, 1 Wheat. 304 (1816) 12

McClung v. Silliman, 6 Wheat. 598 (1821) 4

Michigan v. Chesternut, 486 U.S. 567 (1988) 10

Michigan v. Tyler, 436 U.S. 499 (1978) 11

Mitchell v. Forsyth, 472 U.S. 511 (1985) ...2, 6, 9, 13, 15

Nevada v. United States, 463 U.S. 110 (1983) 17

Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974) 9

Payton v. New York, 445 U.S. 573 (1980) 2, 7, 8, 10

Pulliam v. Allen, 466 U.S. 522 (1984) 5

Siegert v. Gilley, 111 S. Ct. 1789 (1991) 2, 5, 6

Tennessee v. Garner, 467 U.S. 1 (1984) 8

The Fair v. Kohler Die & Specialty Co., 228 U.S. 22 (1913) 3, 17

Thigpen v. Roberts, 486 U.S. 27 (1984) 5

United States v. Al-Azzawy, 784 F.2d 890 (9th Cir. 1985), *cert. denied*, 476 U.S. 1144 (1986) 3, 11, 13, 14, 17

United States v. Mendoza, 464 U.S. 154 (1984) 12

United States v. New York Telephone Co., 434 U.S. 159 (1977) 4

United States v. Santana, 427 U.S. 38 (1976) 7

Whitley v. Albers, 475 U.S. 312 (1985) 4

Williams v. Norris, 12 Wheat. 117 (1827) 4

Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) 8

TABLE OF AUTHORITIES – Continued

Page(s)

CONSTITUTIONAL PROVISIONS AND STATUTES:

Fourth Amendment 10

28 U.S.C. § 1291 15

42 U.S.C. § 1983 .....1, 12

COURT RULES:

S. Ct. R. 10.1 13

S. Ct. R. 14.1 4

Fed. R. Civ. P. 11 7

Fed. R. Civ. P. 56(e) 10

No. 92-8579

In The

Supreme Court of the United States

October Term, 1993

CHARLES K. ELDER,

Petitioner,

vs.

R.D. HOLLOWAY, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICI CURIAE OF THE STATES OF HAWAII, DELAWARE, IDAHO, ILLINOIS, KANSAS, MASSACHUSETTS, MONTANA, PENNSYLVANIA, RHODE ISLAND, VERMONT, WYOMING AND THE TERRITORY OF AMERICAN SAMOA IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICI CURIAE

The amici States have a vital interest in this case, in which this Court has been asked to overturn a judgment of the United States Court of Appeals for the Ninth Circuit that, we submit, properly affirmed a summary judgment in favor of the respondents here on the basis of qualified officer's immunity.

Each of the amici states employ many thousands of officials whose principal defense to personal damages liability under the Civil Rights Act of 1871, 42 U.S.C.

§ 1983, and other laws, is the doctrine of qualified officer's immunity that this Court announced in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and has strengthened and refined in a series of rulings since. *See Davis v. Scherer*, 468 U.S. 183 (1984); *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Malley v. Briggs*, 475 U.S. 535 (1985); *Anderson v. Creighton*, 483 U.S. 635 (1987); *Siegert v. Gilley*, 111 S. Ct. 1789 (1991); *Hunter v. Bryant*, 112 S. Ct. 534 (1991) (per curiam). The amici States thus have an abiding interest in any decision that could affect qualified immunity doctrine.

The amici States are, at the outset, somewhat concerned that the real issue in this case has been lost by Petitioner, and by the judges of the Ninth Circuit Court of Appeals who dissented from the denial of *en banc* review, whose strong opinions may well have prompted the Court to grant review in this case.

Indeed, the critical issue included within the Question Presented by Petitioner is "whether [this] action against government officials for deprivation of constitutional or statutory rights is precluded by qualified immunity"? Pet. Br. at i. The procedural issue that Petitioner desires the Court to reach, namely, whether the failure of Petitioner's counsel to cite the case on which he now (apparently for the first time) seeks to obtain reversal of the District Court's judgment, is in fact far removed from this basic question. That question is three-fold: (1) whether this Court's failure in *Payton v. New York*, 445 U.S. 573 (1980), to require arrest warrants or the presence of exigent circumstances for arrests outside the arrestee's house is dispositive of the qualified immunity issue; (2) whether the summary judgment record requires affirmance in any event because a reasonable officer, faced

with the situation in which Defendants found themselves, would believe that exigent circumstances existed; and (3) whether the *dicta* of the Ninth Circuit in *United States v. Al-Azzawy*, 784 F.2d 89 (9th Cir. 1986), can create "clearly established law." Amici submit that, upon review of these issues, the Court should simply affirm the judgment without reaching the procedural issue raised by the Ninth Circuit's analysis of counsel's forfeiture.

Should the Court reach that procedural question, however, the amici States submit that the Court should still affirm. It has long been the law that "the party who brings a suit is master to decide what law he will rely upon," *The Fair v. Kohler Die & Speciality Co.*, 228 U.S. 22, 25 (1913), and the Ninth Circuit's decision in this case is unremarkable in this regard. The Ninth Circuit's rule regarding the Plaintiff's burden in the District Court – requiring the Plaintiff to "identify the universe of relevant statutory or decisional law from which the court can determine whether the right allegedly violated was clearly established" (J.A. 39) – is procedurally sound, and is a reasonable corollary to the procedural protections this Court has found inherent in the doctrine of qualified immunity.

For these reasons, the amici States submit this Brief in support of Respondents, and thus urge the Court to affirm.

———♦———

STATEMENT OF THE CASE

The amici States adopt Respondents' statement of the case.

ARGUMENT

A. Because the Issue of Whether Defendants are Entitled to Qualified Immunity is Plainly Included Within the Question Presented for Review, This Court Should First Address Whether, Irrespective of Petitioner's Counsel's Failure in the District Court, The Judgment Granting Immunity is Correct; On Such Review, the Court Should Affirm the Judgment.

One of the most simple, yet fundamental, rules of this Court's practice is that "this Court reviews judgments, not opinions." *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842 & n.8 (1984) (citing *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956); *J.E. Riley Investment Co. v. Commissioner*, 311 U.S. 55, 59 (1940); *Williams v. Norris*, 12 Wheat. 117, 120 (1827); *McClung v. Silliman*, 6 Wheat. 598, 603 (1821)). Thus, "any ground properly raised below may be urged as a basis for affirmance of the Court of Appeals' decision." *Whitley v. Albers*, 475 U.S. 312, 326 (1985) (citing *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977)). Moreover, this Court's rules make clear that "[t]he statement of any question presented will be deemed to comprise every subsidiary question fairly included therein." S. Ct. R. 14.1. In this case, the Question Presented plainly includes "whether [this] action against government officials for

deprivation of constitutional or statutory rights is precluded by qualified immunity. . . . ?" Indeed, this Court has been quite straightforward in addressing the merits of an immunity issue before launching into some of the more difficult procedural questions raised by immunity doctrine. See *Siegert v. Gilley*, 111 S. Ct. 1789, 1794 (1991); *Pulliam v. Allen*, 466 U.S. 522, 527-28 & n.5 (1984) (expressly invoking the predecessor of this Court's Rule 14.1).

This is plainly a case where the Court should exercise its prerogative to "affirm on any ground that the law and the record permit." *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984). For under any view of the issues before the District Court, the entry of summary judgment on the basis of *Harlow* immunity was correct. Indeed, that judgment was correct at a minimum three times over.

It is important to stress the properly strong protections that the doctrine of qualified immunity affords to government officers performing discretionary functions. Thus, the rule of qualified officer's immunity is a "protective" one that " 'provides ample support to all but the plainly incompetent or those who knowingly violate the law.' " *Burns v. Reed*, 111 S. Ct. 1934, 1944 (1991) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). Moreover, a federal plaintiff may not pierce qualified immunity merely by showing that a state officer violated state law or policy: "violation of a clear statute or regulation, although not the basis of suit," cannot become a ground on which to "deprive the official of qualified immunity from damages for violation of . . . constitutional provisions." *Davis v. Sherer*, 468 U.S. 183, 193 (1984). For a personal capacity lawsuit to survive a plea for summary

judgment based upon qualified immunity, there must be shown sufficient proof of a violation of "clearly established" "*American* law." *Anderson v. Creighton*, 483 U.S. 635, 646 (1987) (emphasis added).

That a federal constitutional right is "clearly established" in an "abstract" sense is also not enough. *Id.* at 639. It bears emphasis "that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640. "*Harlow* teaches that officials performing discretionary functions are not subject to suit when such questions are resolved against them only after they have acted," and "hindsight-based reasoning on immunity issues is precisely what *Harlow* rejected." *Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985). Therefore, the "decisive fact is not that [a defendant's] position turned out to be incorrect, but that the question was open at the time he acted." *Id.* Where there is a "legitimate question" over the scope of a federal right, there can be no personal capacity liability. *Id.* at 535 n.12; *see also Anderson*, 483 U.S. at 640 (same). The issue is not merely whether the officer acted in a general manner "reasonably"; rather it is "whether the actions [alleged or which the summary judgment record evidences] are actions that a reasonable officer could have believed lawful" under federal law. *Id.* at 646 n.6. Thus, while immunity must be granted where the record fails to disclose violation of a federal right "at all," *Siegert v. Gilley*, 111 S. Ct. 1789, 1793 (1991), it is proper to grant judgment even if one must "assume[ ], *arguendo*, that [the officer] erred

in concluding that [compliance with federal law] existed." *Hunter v. Bryant*, 112 S. Ct. 534, 537 (1991).[1]

Given these accepted teachings, it is surprising that this case even presented any controversy to the Court of Appeals.

First, the underlying, undisputed facts of this case do no more than implicate the gap between two decisions of this Court: *Payton v. New York*, 445 U.S. 573 (1980), which holds that a police officer cannot make a warrantless nonconsensual entry into the home of a suspect, even with probable cause, in the absence of exigent circumstances, and *United States v. Santana*, 427 U.S. 38 (1976), which makes clear that a warrantless arrest on probable cause is constitutional if made in a public place after the suspect has left his home. Neither *Payton* nor *Santana* answer the question raised by the "front porch" arrest in this case, and that should have been the end of the matter in the Court of Appeals. Plaintiffs in this case argued to the District Court "that for all practical purposes, the

---

[1] Qualified immunity under *Harlow* is thus, as a substantive matter, the doctrinal flip-side of the immunity every plaintiff enjoys under Fed. R. Civ. P. 11, as presently worded. Just as federal civil rights plaintiffs may advance losing arguments that are " 'warranted by existing law or a good faith argument' for changing the law," *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 399 (1990), without running the risk of paying their opponents' attorneys' fees, government officers under *Harlow* may take positions that similarly aggressively seek to advance an unestablished rule of law in a particular case. Government officials, like federal Plaintiffs who seek to avoid Rule 11 sanctions, need not have "on point" authority for every action they undertake, for to require such rigid predicates to invoking the powers of government would freeze the government in its tracks.

arrest occurred in the home because Mr. Elder was restrained in the home, once defendants 'constructively crossed' the threshold of the home by surrounding the home and requesting by police loudspeaker and telephone that Mr. Elder come out." J.A. 5. But this notion of "constructive crossing" is nowhere foreshadowed in *Payton*.[2] Indeed, the "fundamental characteristic" of the evil *Payton* sought to address was "breach of the entrance to an individual's home." 445 U.S. at 589. Nor is this "gap" at all "clearly" filled in by the decisions of which Defendants had notice defining what constitutes a "seizure" for purposes of the Fourth Amendment. *E.g., INS v. Delgado*, 466 U.S. 210 (1984).

Thus, precisely because Mr. Elder could remain in his house without any interference whatsoever until either his supplies ran out (or the police obtained a warrant), and was free from being physically questioned in person by police, even if Mr. Elder had a "reasonable fear that [he] would be detained upon leaving," he was not clearly seized *before* he left the house and stepped onto his porch. *Cf. Delgado*, 466 U.S. at 219.

---

[2] Perhaps the case would be different if police threatened to destroy the house or shoot or otherwise harm Mr. Elder if he did not come out, although even in that instance, if in fact Plaintiff's proof were that there clearly were not "exigent circumstances," and, as Plaintiff admits, a telephone hookup was in place, Mr. Elder could be charged with some duty to remind the police of their obligations in this situation. *Compare Tennessee v. Garner*, 467 U.S. 1 (1984), *with Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). If he did so, and the threat were withdrawn, Mr. Elder could be considered free to move about for Fourth Amendment purposes.

In fact, to hold that a warrant *is* necessary in such cases would raise a serious Fourth Amendment dilemma: is it preferable, from a civil liberties perspective, to encourage obtaining a warrant to arrest an individual inside his home, with the attendant invasions of privacy that arise from a search "incident to arrest," or should the warrant requirement be waived when, at least as in the circumstances of this case, the only alleged facts that even arguably alerted Mr. Elder that he was fully under arrest *in* his house were the presence of several armed officers *around* the house; roadblocks in the *area* of the residence; the detention of Plaintiff's *brother*; and the use of a loudspeaker and telephone to communicate that Plaintiff "should" surrender? J.A. 5 (emphasis added).

It is the hallmark of qualified immunity analysis that the Court is not required to answer this question in order to rule for Respondents. The critical fact "is not that [a defendant's] position turned out to be incorrect, but that the question was open at the time he acted." *Mitchell v. Forsyth*, 472 U.S. at 535. Plainly as a matter of this Court's precedents, at the time Respondents acted the question was open, even in the clear absence of exigent circumstances. The question we believe the Court must ask is this: was the "seizure" or "crossing" question at issue in this case such that this Court would seriously consider granting certiorari on its merits, or was that issue " 'insubstantial, implausible, foreclosed by prior decisions of this Court or otherwise completely devoid of merit.' " *Hagans v. Lavine*, 415 U.S. 528, 543 (1974) (quoting *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666-67 (1974)).

That the answer is that this case is in the former, not latter, category, is demonstrated by this Court's decision

in *Michigan v. Chesternut*, 486 U.S. 567 (1988), handed down several months after the "arrest" in this case. As the Court noted in *Chesternut*, the test for determining whether a person has been placed under arrest "is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation." *Id.* at 573. Whatever this Court's answer is as to whether Mr. Elder was "arrested" in some sense in his house before he left it, good arguments can be made that "whether or not the officers' conduct communicates to a person a reasonable belief that they intend to apprehend him, such conduct does not implicate Fourth Amendment protections until it achieves a restraining effect." *Id.* at 577 (Kennedy, J., joined by Scalia, J., dissenting). In 1987, when the arrests at issue occurred, it was neither "plainly incompetent," nor a "knowing violation" of "American law," as announced by *this* Court, to engage in the conduct at issue in this case, even in the clear absence of exigent circumstances as described in *Payton*.

A second major ground why the Court should affirm on the merits of the immunity question is whether a "reasonable officer" would believe that exigent circumstances existed in any event. As the District Court observed, this case presented circumstances including a suspect believed to be wanted for a crime of violence (Elder was wanted for aggravated battery), who was believed to be armed, and who was likely to flee. *See* J.A. 6-7. The District Court held there were genuine issues of material fact on this question, but neither the District Court nor Petitioners adduced any "specific facts," within the meaning of Rule 56(e), Fed. R. Civ. P., to rebut the fact

that, when police came upon the scene "the Elder brothers [were] loading what appeared to be camping equipment into a pickup"; nor did Plaintiff rebut that police learned for the first time upon coming to the Elder home that Petitioner "had access to several firearms in the home." J.A. 3. In this Court's leading case on the subject of exigent circumstances, *Michigan v. Tyler*, 436 U.S. 499 (1978), the Court cautioned that the lower courts ought not be "unrealistically narrow" in their assessment of exigency. *Id.* at 510. Warrantless entries are clearly valid when officers are in "hot pursuit" of an armed felon, or act to prevent imminent destruction of evidence. *Id.* at 509. Indeed, the general test of "exigent circumstances" is whether "there is compelling need for official action and no time to secure a warrant." *Id.* In light of the test under *Harlow* – whether an officer would have been "plainly incompetent" in thinking that this general test authorized the actions here – immunity exists on this straightforward ground as well. Indeed, to hold otherwise suggests it was frivolous for Defendants to raise the exigent circumstances exception on the merits. *Cf. Anderson v. Creighton*, 483 U.S. at 639, 640, *with Cooter & Gell v. Hartmarx*, 496 U.S. at 399. None of the Courts below so held; nor should this Court, either.

Although the foregoing analysis would seemingly be dispositive of the immunity issue here, many of the courts of appeals have struggled to determine when, and under what circumstances, the "law of the circuit" may give rise to "clearly established American law," thus leading to the problem in this case, namely, whether *United States v. Al-Azzawy*, 784 F.2d 890 (9th Cir. 1985), *cert. denied*, 476 U.S. 1144 (1986), compels a different result or

ought to have been cited in the trial court. Indeed, the Ninth Circuit has candidly acknowledged that "[t]he circuits disagree as to whether [even] intercircuit conflict on a point of law negates the clearly established nature of a right." *Lum v. Jensen*, 876 F.2d 1385, 1389 (9th Cir. 1989) (citing and discussing cases from Third, Seventh, and Tenth Circuits, and announcing that "the absence of binding precedent in this circuit plus the conflict between the circuits is sufficient, under the circumstances of this case, to undermine the clearly established nature of a right").

The amici States submit that this formulation of the immunity inquiry, and the courts of appeals' preoccupation with circuit precedent, seriously undercuts the central and exclusive role of this Court in defining "American law" in a controlling manner for all lower courts, state and federal.

Like other prudential doctrines, the immunity provided by *Harlow* exists because a less protective rule "would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue," "depriv[ing] this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari," *United States v. Mendoza*, 464 U.S. 154, 160 (1984) (Rehnquist, J., for a unanimous Court) (rejecting nonmutual collateral estoppel in cases against the Government). In cases implicating 42 U.S.C. § 1983, these prudential considerations are even more pressing, because state as well as federal courts have a vital role to play in interpreting the Constitution's mandates on state officers. *See Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 240 n.1 (1985) (citing, *e.g.*, *Martin v.*

Hunter's Lessee, 1 Wheat. 304, 341-44 (1816)). Allowing "law of the circuit" to play the forceful role that it does in qualified immunity analysis in many circuits is to not only "denigrate[] the judges who serve on the state courts," *id.*, but also diminish this Court's role in defining "American law." *See Hutto v. Davis*, 454 U.S. 370, 375 (1982).

The relevant question on a qualified immunity issue, we submit, is whether counsel defending the conduct at issue would have been, at the time the conduct at issue occurred, on good ground in seeking to invoke this Court's predicates for a writ of certiorari on the underlying merits issue in the case. Those situations, set out in this Court's Rule 10.1, include not only conflicts among the courts of appeals, or among, or involving the highest courts of the States, but also include cases involving an "important question of federal law which has not been, but should be, settled by this Court." After all, the immunity issue turns upon whether "the question was open at the time [Defendant] acted," *Mitchell*, 472 U.S. at 535, and this Court's Rule 10.1 is targeted on precisely those questions.

This standard is important and compelling, because it makes wholly irrelevant the procedural issue in this case whether the Petitioner ought, or ought not, be punished for his failure to cite the *Al-Azzawy* decision of the Ninth Circuit in the District Court. In looking to "American law," the Ninth Circuit ought to have focused on whether *this* Court's precedents created "clearly established" law; and because no one, not even Petitioner, has ever urged that this is the case, proper elaboration of the

test for qualified immunity therefore requires this Court to affirm.

Even if this were not so, however, as the Ninth Circuit panel pointed out (J.A. 35), all of the *Al-Azzawy* panel's analyses of the "constructive seizure" issue were *dicta*, because the court concluded that exigent circumstances were present there in any event. Thus, even if *Harlow* requires a court of appeals to follow "clearly established" circuit precedent in assessing immunity, it does not require adherence to the oxymoronic notion of "clearly established" circuit *dicta*. Because, for all these reasons, the judgment for Defendants was wholly correct, this Court should affirm without regard to the procedural issue here.

B. If the Court Reaches the Issue Whether Petitioner Should Be Held Accountable for His Counsel's Failure Adequately to Brief the Immunity Issue in the District Court, This Court Should Nonetheless Affirm the Ninth Circuit.

As this Court has repeatedly emphasized, qualified immunity is "specifically designed to 'avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.' " *Burns v. Reed*, 111 S.Ct. 1934, 1944 & n.8 (1991) (quoting *Malley v. Briggs, supra*, 475 U.S. at 341)). As it has weighed the competing policies implicated by the immunity doctrine, this Court has also held that "the 'consequences' with which we were concerned in *Harlow* are not limited to liability for money damages; they also include 'the general costs of subjecting officials to the risks of trial –

distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.' " *Mitchell v. Forsyth, supra*, 472 U.S. at 526. Thus, "even such pretrial matters as discovery are to be avoided if possible, as '[i]nquiries of this kind can be peculiarly disruptive of effective government.' " *Id.* Therefore, "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an [immediately] appealable 'final decision' within the meaning of 28 U.S.C. § 1291" despite the lack of a final judgment. *Id.* at 530. Moreover, as this Court has suggested, a "heightened pleading standard" may well be appropriate in cases where an officer's "immunity from suit" is at issue. *See Leatherman v. Tarrant County Narcotics Unit*, 113 S.Ct. 1160, 1162-63 (1993) (rejecting the standard "in this case" because what was at issue was whether a municipal defendant was subject to "liability" on the merits).

The Ninth Circuit's requirement that a civil rights Plaintiff place an individual-capacity Defendant on notice of the relevant universe of legal precedent relied on to pierce an immunity defense is quite consistent with, indeed, supported by, the procedural rules this Court has crafted so as properly to implement the goals and policies underlying *Harlow* immunity. Whether intentional or not, reversal of a grant of immunity on the basis of wholly new (but previously discoverable) authorities cited for the first time on appeal not only does disservice to the process of litigation in the District Courts as a general matter, but, even if tolerable in other contexts, imparts an entire additional layer of " 'general costs of subjecting officials to the risks of [litigation],' " *Mitchell*, 472 U.S. at

526. Imposing these risks – which in this case alone could, if Petitioner's appeal is granted, subject Respondents to years of additional litigation without any assurance that the Petitioner would be entitled to relief – is barred by *Harlow*.

Indeed, even as a general matter, litigants cannot bring up new lines of argument for the first time in the courts of appeals as a matter of right. As this Court has noted with regard to its own treatment of issues poorly raised below, "[u]nder the mere enlargment doctrine, '[p]arties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed[,]' " but "the federal question must be brought to the attention of the court below in some manner." *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 78 n.2 (1988) (quoting *Dewey v. Des Moines*, 173 U.S. 193, 198 (1899)). When issues of immunity are at stake, the case can and often does turn on a very distinct line of decisional law. By requiring Plaintiffs to define the universe of case authority on which they rely, the Ninth Circuit has laid down a rule that is quite consistent with due process concerns and the "heightened pleading standards" that most Circuits have adopted, and which this Court left intact by its recent decision in *Leatherman v. Tarrant County Narcotics Unit*, 113 S.Ct. at 1162-63.

Thus, while no one would possibly dispute that "the province and the duty of the judicial department is to say what the laws is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), "the law" does not make civil rights plaintiffs immune to their forfeitures in the District Court. As Justice Holmes wrote for this Court eighty years ago, "the party who brings a suit is master to

decide what law he will rely upon." *The Fair v. Kohler Die & Speciality Co.*, 228 U.S. 22, 25 (1913).

Reversal of the Ninth Circuit's decision in this case is even more inappropriate given Elder's nearly total failure even in the Ninth Circuit to rely on the allegedly critical precedent. Although Elder perfunctorily cited *Al-Azzawy* to the Ninth Circuit panel in his main briefs, he affirmatively refused to rely on it when pressed by the panel, conceding that "all cases are distinguishable." J.A. at 35 n.1. At some level, if the failure to *Al-Azzawy* was prejudicial to Elder's case – a point we dispute – Elder's remedy lies with his counsel, "not against third parties." *Nevada v. United States*, 463 U.S. 110, 144 n.16 (1983). Accordingly, this Court should affirm.

CONCLUSION

For the foregoing reasons and for those stated by Respondents, the judgment of the Court of Appeals should be affirmed.

Dated: Honolulu, Hawaii, September 29, 1993.

ROBERT A. MARKS
Attorney General
State of Hawaii

STEVEN S. MICHAELS*
Deputy Attorney General
State of Hawaii
*Counsel of Record

425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1365

Counsel for Amicus Curiae
State of Hawaii
[Other counsel
listed on inside
front cover]